IN THE SUPREME COURT OF THE
STATE OF MISSOURI

JOEL C. BIANCO, et al., Respondents, v. MERAMEC VALLEY BANK, Appellant.	No. SC 84046

ON APPEAL FROM THE JUDGMENT OF THE
CIRCUIT COURT OF ST. LOUIS COUNTY
TWENTY-FIRST CIRCUIT
THE HONORABLE JAMES R. HARTENBACH,
AND TRANSFER FROM THE
COURT OF APPEALS FOR THE EASTERN DISTRICT

APPELLANT'S SUBSTITUTE BRIEF

CAMPBELL & COYNE, P.C.
Michael A. Campbell #35392
Paula Colman #43006
7777 Bonhomme Ave., 15th Floor
St. Louis, Missouri 63105
(314)721-8000 telephone
(314)721-8080 facsimile

Attorneys for Appellant

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JURISDICTIONAL STATEMENT

On September 4, 2001, the Missouri Court of Appeals, Eastern District filed its opinion in this cause. Without dissent, the Court of Appeals held that the Trial Court lacked subject matter jurisdiction to hear the cause or to enter a jury's verdict, because Respondents' claims were compulsory counterclaims to an earlier-filed replevin action initiated by Appellant. After the Court of Appeals denied Respondents' Application for Transfer, Respondents filed an (albeit misnamed) "Appellants' Application for Transfer to the Missouri Supreme Court" pursuant to Rule 83.04 of the Missouri Rules of Civil Procedure. This Court granted the Application on December 18, 2001, and shall hear the appeal under its jurisdiction pursuant to the Missouri Constitution, Article V, Sections 9 and 10.

STATEMENT OF FACTS

The Replevin Case

On October 3, 1997 Appellant Meramec Valley Bank ("Meramec") filed a lawsuit in the Circuit Court of St. Louis County for replevin and collection on two separate promissory notes (the "Replevin Case"). *Meramec Valley Bank v. Joel Bianco Kawasaki Plus and Joel Bianco d/b/a Joel Bianco Kawasaki Suzuki Plus*, 14 S.W.3d 684 (E.D. Mo. 2000)[1] (LF 341).[2] The lawsuit sought relief on four counts: In Counts I and II, Meramec asserted that Respondent Joel C. Bianco ("Joel Bianco") breached a certain promissory note and was entitled to replevin under a certain security agreement executed on November 18, 1994 in the original principal amount

[1]Meramec respectfully requests this Court to take judicial notice of the facts previously heard by the Eastern District in the Replevin Case, *Meramec Valley Bank v. Joel Bianco Kawasaki Plus and Joel Bianco d/b/a Joel Bianco Kawasaki Suzuki Plus,* Cause No. 97CC-003312, St. Louis Co., MO, reversed and remanded (Appeal No. 75991). Bianco similarly requested the Trial Court twice to take judicial notice of the filings in the Replevin Case. (Tr.Vol.I p.41,ln.10-16; Tr.Vol.VII p.778,ln.7-12).

[2] For ease of reference, the following abbreviations have been used: "LF" for Legal File; "Tr.Ex." for Trial Exhibit; and "Tr." (sometimes followed by a volume number where applicable) for Trial Transcript.

of $45,000.00, a loan guaranteed by the U.S. Small Business Administration (the "SBA Loan"). *Meramec,* 14 S.W.3d at 686. (Tr. pp.4-5; p.45,ln.7-20; Tr.Vol.VI p.715,ln.17-25; p.716,ln.1-10; LF 342-345; Tr.Ex. 85 and 86). In Counts III and IV, Meramec asserted that Respondent Joel Bianco Kawasaki Plus, Inc. ("Bianco Kawasaki") breached a certain loan and was entitled to replevin under a certain security agreement it executed on October 19, 1995 in the original principal amount of $75,750.00 (the "Ski Nautique Loan"). *Meramec,* 14 S.W.3d at 686. (Tr. pp.6-7; LF 345-348; Tr.Vol.VI p.715,ln.17-25; p.716,ln.1-10; Tr.Ex. 88 and 89). Bianco and Bianco Kawasaki (collectively, "Bianco") each pledged to Meramec certain collateral, including dealership equipment, inventory, and accounts receivable to secure the SBA Loan and the Ski Nautique Loan. *Meramec,* 14 S.W.3d at 686. (Tr. p.6,ln.6-8; p.7,ln.17-25; p.8,ln.25; p.9,ln.1-6; p.45,ln.21-25; LF 341-367; Tr.Vol.II 247-249).

The Trial Court in the Replevin Case issued an order of delivery, as amended, and subsequently entered a default judgment against Bianco on the remaining Counts. *Meramec Valley Bank v. Joel Bianco Kawasaki Plus and Joel Bianco d/b/a Joel Bianco Kawasaki Suzuki Plus,* 14 S.W.3d at 686-7. Bianco appealed this default judgment, whereupon this Court reversed and remanded the judgment for further proceedings. *Id.* at 690. Following the remand of the Replevin Case by this Court in the Replevin Case, Bianco filed a counterclaim on May 15, 2000. (LF 442). The counterclaim is still pending. It is premised on the allegation that Meramec

deliberately seized property on October 6 and 8, 1997, among other allegations. (LF 442). (See Counterclaim at LF 442-4 for further details of these allegations).

The following details the events that caused Meramec to file the Replevin Case against Bianco and those that contemporaneously provoked Bianco to file a **second** lawsuit against Meramec, the instant case now on appeal.

The Letters of Credit

Before delving into the specific events, it is important to know that in addition to the SBA Loan and the Ski Nautique Loan, Meramec had also issued two irrevocable letters of credit on behalf of Bianco Kawasaki for the benefit of floor plan financiers[3] Bombardier Capital, Inc.[4] (the "$100,000.00 Letter of Credit") and Polaris

[3]Bianco Kawasaki was in the business of selling, among other things, motorcycles, boats and personal watercraft, which it purchased directly from various manufacturers and financed under what is commonly referred to as "floor plan financing" whereby Bianco Kawasaki paid the floor plan financiers with the proceeds of each vehicle sold. (Tr. p.9,ln.1-9; p.28,ln.10-16; Tr.Vol.I p.7,ln.12-24; Tr.Vol.V p.568,ln.7-23). The financiers, in turn, would release their security interest in each particular vehicle "on the floor" upon each sale.

[4]Bombardier Capital, Inc. ("Bombardier"), as well as other financiers involved in this case, works in conjunction with manufacturers (i.e., Bombardier Corporation, maker

Acceptance ("Polaris")(the "$45,000.00 Letter of Credit"). *Meramec,*14 S.W.3d at 686. (Tr. pp.9-10, 19-20; p.75,ln.7-25; Tr.Vol.I p.9,ln.2-13). Under the terms of the letters of credit, Meramec promised to pay the beneficiaries for any amounts drawn upon when presented a proper sight draft at any time prior to the expiration date. (Tr.p.16,ln.18-24; p.17,ln.23-25; p.18,ln1-2; p.47,ln.3-8,18-20). The expiration date of the $100,000.00 Letter of Credit was October 19, 1997.[5] (Tr.p.16,ln15-17; p.46,ln18-19).

Meramec documented the $100,000.00 Letter of Credit in the form of a promissory note to Bianco Kawasaki (to be funded when the letter of credit was issued

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of the SeaDoo personal watercraft) to provide commercial financing for businesses, leasing and inventory financing for dealerships such as Bianco Kawasaki. (Tr.Vol.I. p.3,ln.4-25). They are collectively referred to as "manufacturers" herein.

[5]Bombardier stated that under its terms, the $100,000.00 Letter of Credit was renewable within sixty (60) days prior to the expiration date. Bombardier further agreed that to continue doing business with a dealership such as Bianco Kawasaki, it would either renew a letter of credit or confirm that another would be issued in its place. Bombardier, however, confirmed that it did not exercise its right to renew in mid-August 1997 in order to more fully secure its interest beyond October 19, 1997. (Tr.Vol.I., pp.94-95).

one year later) secured by its business assets as well as money market accounts pledged by Joel Bianco and his mother, Frances Love, each containing balances of $25,000.00. (Tr. pp.8-10,ln.15; p.46,ln.8-15; Tr.Ex. 2, 46, 47, 48, 51). The $45,000.00 Letter of Credit was secured by a lien on all business assets and on certain used vehicles owned by Bianco Kawasaki as well as a pledged bank account holding proceeds of the sale of the used vehicles and a guaranty from Joel Bianco. (Tr. pp.23-26; p.47,ln.21-25; pp.48-49; Tr.Ex. 14, 17). Meramec loaned these additional amounts for the letters of credit knowing that the collateral Bianco provided was weak and left Meramec undersecured. (Tr. p.35,ln.7-9). In light of this, Meramec's own records reflected the bank's intent, if not its action, to monitor the loans to Bianco monthly by reviewing in-house statements and inspecting the premises to verify used inventory. (Tr. p.35,ln.1-12; p.36,ln.23-25).

The Prospective Purchasers

In late August 1997, Michael and Mary Anne Binns (collectively, "the Binns") approached Meramec indicating that they were considering purchasing the assets of Bianco Kawasaki. (Tr. p.39,ln.2-20; p.38,ln.14-22; p.39,ln.2-16). The Binns offered to pay Bianco $500,000.00 providing half of that in cash at closing in mid-September.[6] (Tr.Vol.III p.488,ln.2-25).

[6]The Binns actually discussed obtaining $500,000.00 in financing from Meramec to fund the purchase. (Tr. p.59,ln.5-9; p.62,ln.2-8). A loan officer from Meramec recalled

On September 18, 1997, Joel Bianco disclosed to Meramec that he and his company, Bianco Kawasaki, had sold numerous items "out-of-trust"[7] owing various manufacturers over $300,000.00. (Tr.p.42,ln.2-24; p.61,ln.10,16-20; p.73,ln.18-23; Tr.Vol.III p.498-499). When asked about the deficiencies, Joel Bianco stated to Meramec that neither he nor Bianco Kawasaki had any cash available to pay back the these amounts, explaining that the business had not recovered from cash flow problems due to monies spent on improvements made in early 1997, including installing carpeting, a waterfall and an indoor pool to allow Jet Skis to float. (Tr. p.50,ln.12-25; p.51,ln.1-5; p.61,ln.14-15).

On September 22, 1997, Meramec learned that the Binns had ceased negotiations for the purchase of Bianco Kawasaki's assets and that a new potential purchaser, Thomas Mauer who was acting on behalf of a gentleman named Nevan

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the Binns asking for a loan of $350,000.00 to purchase the assets and another loan for $200,000.00 to obtain their own letters of credit. (Tr. p.60,ln.1-10).

[7]If proceeds of the sales of inventory, i.e., motorcycles and watercraft, were not delivered to the financiers within a few days, the borrower was said to have had "sold out-of-trust." (Tr.Vol.I, p.10,ln.16-19; p.67,ln.15-25; Tr.Vol.V pp.569-570). A borrower selling out-of-trust has typically breached the security agreement executed with the respective financier. (Tr.Vol.I, p.63,ln.4-8).

Fisher ("Mauer and Fisher"), had stepped in.[8] (Tr. p.39,ln.18-25; p.40,ln.2-22; p.62,ln.20-25; p.63,ln.1-11; p.66,ln.2-12; Tr.Ex. 9). Despite repeated requests, Bianco failed to provide Meramec with a copy of either of the proposed sale agreements but assured Meramec that the terms he was negotiating with the prospective purchasers would allow he and Bianco Kawasaki to satisfy their obligations to Meramec in full. (Tr. p.51,ln.6-25; p.61,ln.1-4; p.61,ln.9-16; p.66,ln.13-20; Tr.Vol.III p.531,ln.9-25). During their meeting on September 22, 1997, Joel Bianco did not disclose to Meramec that two days later he would transfer "trustee control" of Bianco Kawasaki to Mauer and Fisher as well as access to "all information regarding my loans, bank accounts, collateral, paperwork or information of any type that he requests." (Tr. pp.77-78; Tr.Ex.10). Meramec then requested a copy of the sale contract from Mauer who twice refused. (Tr. p.78,ln.15-22; p.81,ln.23-25; Tr.Vol.VI p.714,ln.18-25).

Meramec then confirmed with manufacturers that the amount Bianco was out of trust was closer to $500,000.00, not $300,000.00 as Joel Bianco indicated one week

[8]Bianco rejected Binns' $500,000.00 offer and another contemporaneous offer for $645,000.00 in large part because neither party would agree to (1) keep the Bianco Kawasaki name on the front of the building following the sale, or (2) provide Joel Bianco a consulting agreement. Joel Bianco also did not believe that Binns had the cash to proceed. (Tr.Vol.III pp.489-490; pp.495-497).

earlier. (Tr. p.79,ln.1-10; p.83,ln.6-19). Meramec further learned that, as part of the asset purchase price, Mauer and Fisher were attempting to negotiate a settlement with Bianco Kawasaki's manufacturers (two of whom held the letters of credit) for less than the balance owed. (Tr. 79,ln.16-25; p.80,ln.1-11; Tr.Vol.III p.366,ln.14-25; pp.367-369; p.436,ln.23-25; p.437; Tr.Ex.11). The sale contract also provided that Joel Bianco would additionally receive $5,000.00 per month for an indefinite period as part of a separate "consulting agreement" with Mauer and Fisher. (Tr.Vol.III p.437,ln.17-20; p.452,ln.10-25; p.253,ln.1-20). Meramec was alarmed that if Mauer and Fisher intended to pay Bombardier and Polaris less than the amounts owed, they would call on their letters of credit for any deficiency, essentially causing Meramec to pay part of the purchase price.[9] (Tr. 79-82; Tr.Ex.11, 12¶6).

[9]The Sale Contract Bianco executed with Mauer and Fisher stated that they intended to pay the manufacturers the full amounts they were owed that Bianco sold out-of-trust and the letters of credit. (Tr.Vol.III p.369-373; p.383,ln.7-14; Tr.Ex.11, 12¶6). However, following the replevin Joel Bianco learned that Mauer and Fisher did not intend to abide by this term; they intended to negotiate a lower amount with the manufacturers which would, in fact, require them to call the letters of credit. (Tr.Vol.V pp.560-561). Even Joel Bianco acknowledged that if Mauer and Fisher did not get their price term, they "had the right as a buyer to walk away." (Tr.Vol.V

On September 25, 1997, Meramec confronted both Joel Bianco and Mauer with its concerns demanding, among other things, additional collateral from Bianco. (Tr. 81-82; Tr.Vol.III p.443,ln.2-15; Tr.Vol.III p.499-500; Tr.Vol.VI p.708,ln.7-24; pp.708-711; p.717,ln.4-25). Mauer refused to deny his intentions to use the letters of credit to fund the asset purchase. (Tr. p.82,ln.1-11; Tr.Vol.VI p.708,ln.7-24). Instead, Mauer delivered to Meramec his handwritten note stating that "no transaction shall take place within [Bianco Kawasaki's bank] account from this date forward unless approved by [Mauer]". (Tr. p.98,ln7-25; Tr.Ex.57). Mauer further independently directed Meramec to contact him each morning to inform him which checks had been presented and to allow him to determine which ones would be paid or returned. (Tr. p.98,ln.17-24; p.100,ln.11-19). Despite handing over control of the business to Mauer and Fisher (or Mauer and Fisher attempting to seize control), Joel Bianco still claimed to be without a sale contract, unaware of the purchase price and unaware of any plan regarding the letters of credit. (Tr. p.82,ln.7-25; p.83,ln1-5; Tr.Vol.III pp.514-515; p.524,ln.7-22; p.528,ln.10-24).

Just prior to filing the Replevin Case on October 3, 1997, Meramec learned that other creditors claimed Bianco had defaulted under various floor plan financing and

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p.561,ln.15-23). Joel Bianco testified that he had no control over what buyers or manufacturers were willing to accept or accede. (Tr.Vol.V p.565,ln.18-24).

related dealership franchise agreements and that these creditors may assert or had already asserted claims against Bianco Kawasaki's collateral, including but not limited to, dealership equipment and inventory. (Tr.Vol.VI p.719,ln.21-25; p.720,ln.1-12). Also unsure of Bianco Kawasaki's future, Bombardier[10], Polaris[11] and Kawasaki Motors Finance Corporation ("Kawasaki") had already filed lawsuits against Bianco, and others had demanded payment in full. (Tr.Vol.I p.13-14; Tr. 145-146; Tr.Vol.III, p.436,ln.3-12; p.522,ln.2-22; Tr.Vol.V p.572,ln.22-25; pp.624-625;

[10]Bianco, in fact, requested the trial court to take judicial notice of *Bombardier Capital, Inc. v. Joel Bianco Kawasaki Plus, Inc.*, Case No. 97CC-3166-7CV (St. Louis Co., MO), a replevin action filed on September 24, 1997; the Order of Delivery was issued the same day. (Tr.Vol.I p.14-15; Tr.Ex. 108). Bombardier indicated that it did not immediately seize Bianco Kawasaki's property because it was negotiating the asset sale with potential buyers (the Binns and later Mauer and Fisher). (Tr.Vol.I p.15,ln.23-25; p.16,ln.1-16). Judgment was eventually entered against Bianco in the amount of $232,000.00. (Tr.Vol.I p.63,ln1-2).

[11]Bianco also requested the trial court to take judicial notice of *Polaris Acceptance, Inc. v. Joel Bianco Kawasaki Plus,* Case No. 97CC-3189-1 (St. Louis Co., MO), yet another replevin action filed on September 25, 1997. (Tr.Vol.III p.347,ln.23-25; p.348,ln.1-7).

Tr.Ex.108).

On September 25, 1997, Meramec contacted Bombardier to inquire whether it intended to call on the $100,000.00 Letter of Credit. (Tr. pp.85-86; Tr.Vol.VI, p.712,ln.1-24). Although not admitted for the truth of the matter asserted, Bombardier neither confirmed nor denied its intent to do so. (Tr. pp.85-86; Tr.Vol.VI p.713,ln.1-18). Meramec then met with Joel Bianco to review the outstanding loans, the letters of credit, the out-of-trust balance, the sale contract, the bank's collateral position, his and Bianco Kawasaki's solvency, and his ability to put up additional collateral. (Tr. p.87,ln.4-15; p.88; Tr.Vol.II p.244,ln.9-12). Among other things, Joel Bianco acknowledged that he definitely wanted to sell and needed to in order to relieve himself of the out-of-trust balance, but that he had not executed a sale contract with Mauer and Fisher yet. (Tr. p.90,ln.2-7; p.96,ln.19-22).

One week later, on October 3, 1997, Bombardier presented a sight draft to Meramec, drawing the full amount of the $100,000.00 Letter of Credit.[12] (Tr. p.9,ln.19-25; pp.10-19; p.85,ln.7-16; p.86,ln.5-11; Tr.Vol.I p.20,ln.1-16; p.21,ln.20-25; p.29; p.72,ln.3-22; p.73,ln.2-12; Tr.Ex. 3). Alleging the sight draft failed to comply with the letter of credit, Meramec refused to honor the sight draft and returned

[12] The sight draft was dated September 17, 1997, the day after Bombardier audited Bianco Kawasaki and demanded it pay the $317,000.00 it discovered was sold out-of-trust.

it with instructions to Bombardier. (Tr.Vol.I p.46; Tr.Vol.VI p.748,ln.8-21; Tr.Ex. 18). Bombardier forwarded a revised sight draft to Meramec on October 13, 1997. (Tr.Vol.I p.47-48; Tr.Vol.VI p.748,ln.22-25; Tr.Ex.20). Meramec believed there was potential fraud[13] in connection with the $100,000.00 Letter of Credit. With the expiration date of the $100,000.00 Letter of Credit looming, the parties agreed to a standstill, thereby extending the expiration date until payment on or about December 8, 1997. (Tr.Vol.I p.52,ln.23-25; p.53-55; Tr.Vol.III p.305,ln.14-25; p.306,ln.1-10; Tr.Vol.VI p 752,ln.14-25; pp.753-754,ln.1-15: Tr.Ex. 29, 30, 52).

The Replevin

On October 3, 1997, Meramec filed the Replevin Case and the Circuit Court immediately granted Meramec an Order of Delivery, as amended on October 6, 1997. *Meramec*, 14 S.W.3d at 686. (LF 368; 373; Tr.Vol.VI p.720,ln.2-13). On October 6, 1997, Meramec, accompanied by a deputy from the St. Louis County Sheriff's Office, arrived at Bianco Kawasaki to seize the personal property located on the premises of Bianco Kawasaki pursuant to the Order of Delivery. *Meramec*, 14 S.W.3d at 686. (Tr.Vol.II p.241,ln.3-5; Tr.Vol.VI p.720,ln.14-17; Tr.Vol.VII p.848,ln.19-25). Before taking any of the property, Joel Bianco was very upset, and he asked Meramec not to do so. (Tr.Vol.II p.241,ln.6-15; Vol.III pp.444-445;

[13]Such fraud was never substantiated.

Tr.Vol.VI p.720,ln.18-19; p.755,ln.9-20). Meramec told Joel Bianco that Bianco had $240,000.00 in obligations to the bank and, under the circumstances, Meramec was insecure about its ability to be repaid. (Tr.Vol.II p.241-244; Tr.Vol.III pp.296-297; pp.446-447; Tr.Vol.VI p.703,ln.15-25; p.704,ln.1-3; Tr.Vol.VI p.720,ln.18-23; Tr.Vol.VI p.755,ln.21-24; Tr.Ex.5, 34). Having just returned from California, Joel Bianco was "shocked" and disputed that Bianco had borrowed that amount of money from Meramec. (Tr.Vol.III p.446,ln.17-25; p.447,ln.1-3).

To protect its position, Meramec advised Joel Bianco that it needed $240,000.00 worth of collateral (the total amount extended to Bianco)[14] in order to cease the replevin. *Meramec,*14 S.W.3d at 686, 689. (Tr.Vol.II p.241-244; p.251,ln.3-5; p.252,ln.9-25; p.316,ln.8-25; p.317,ln.1-17; Vol.V p.550,ln.23; p.551,ln.6; Tr.Vol.VI p.720; p.721,ln.6-24; Tr.Ex. 5, 34, 115). Joel Bianco agreed to provide the bank a *third* deed of trust on his home[15] (Joel Bianco believed his equity was

[14]According to Meramec's valuations of the collateral on hand, Meramec was demanding that Bianco provide an additional $125,000.00 to bring the total amount of the collateral to $240,000.00. (Tr.Vol.II pp.241-244; p.251,l n.3-5; p.252,ln.9-25; Tr.Ex. 5, 34).

[15]On September 22, 1997, Joel Bianco granted Mauer a second deed of trust on his home to secure $50,000.00, $32,000.00 of which was used to pay down business debts

approximately $45,000.00), a second security interest in a boat owned by Joel Bianco (Meramec already held a first; no one believed there was any additional equity), and that his mother, Frances Love, could post $25,000.00. (Tr.Vol.II. pp.256-257; p.260,ln.1-17; Vol.III p.449-451; Tr.Vol.VI p.722,ln.7-18; Tr.Ex.101,117).

A meeting was held on October 6th between Meramec, Bianco and their counsel, as well as Joel Bianco's mother, Frances Love, who agreed to pay $25,000 as additional security pursuant to an agreement with Meramec. *Meramec,* 14 S.W.3d at 686, 689. (L.F. 11-12) In return for the additional collateral,[16] Meramec temporarily stopped its replevin to allow Bianco and its creditors and Fisher and Mauer to meet on October 7 and 8, 1997. *Meramec,* 14 S.W.3d at 686. (Tr.Vol.II, p.258,ln.2-18; Vol.III pp.450-451; Vol.V p.546,ln.22-24; Tr.Vol.VI p.677,ln.5-20; p.722,ln.19-25; p.723,ln.7-11; Tr.Ex.36,117). Meramec and Bianco memorialized the conditions of this and additional mutual promises in a certain Standstill Agreement

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to Suzuki. (Tr.Vol.III pp.502-505; Tr.Ex.105). Mauer also held another deed of trust for $25,000.00. (Tr.Vol.III pp.508-509).

[16]By Meramec's calculations after it executed the Standstill Agreement with Bianco on October 6, 1997, if the letters of credit were called, the value of all of the collateral pledged by Bianco still left Meramec *under*secured in the amount of approximately $104,000.00. (Tr.Vol.III p.299-301; Tr.Ex.5).

dated October 7, 1997. (Tr.Ex.36).

The Meetings with Creditors

Pursuant to the Standstill Agreement, on October 7, 1997, counsel and representatives for Meramec and Bianco, who were later joined by Mauer and his counsel met to discuss Bianco's obligations and the potential asset purchase of Bianco Kawasaki. (Tr.Vol.VI pp.723-728; Tr.Vol.VII pp.798-801). On the morning of October 8th, the second meeting commenced with Bianco and representatives for Meramec, Mauer and Fisher, Bombardier, Kawasaki, and Polaris at the offices of Bianco's counsel. (Tr.Vol.VI p.728,ln.8-13). There, counsel for Kawasaki "took charge" and began by moderating a discussion to determine what the creditors were owed and what their negotiating positions were. (Tr.Vol.III p.348-350; Tr.Vol.V pp.610-611). Meramec declared that it wanted to be paid in full, including the amounts to be paid on the Letters of Credit, its attorneys' fees and costs of replevin. Everyone balked – particularly about Meramec's request for fees and costs -- but no one allayed Meramec's concerns that the Letters of Credit were, in fact, going to be used as part of the purchase price to pay down the creditors. (Tr.Vol.VI p.728,ln.14-19; p.737,ln.17-25; p.738,ln.8-25; pp.739-740)

Each creditor was asked to discount its position, and after several hours of negotiating, Meramec told Bianco that it had reached an agreement with all of the manufacturers that would allow the sale to close if Mauer and Fisher agreed to

increase the purchase price by $50,000.00. (Tr.Vol.III p.351; Tr.Vol.V. p.576,ln.6-12; Tr.Vol.VI p.727,ln.10-17; p.732,ln.1-15). Bianco relayed this information to Mauer and Fisher and the manufacturers, who were unaware of any deal with Meramec, except that Bombardier had offered to draw $50,000.00 less on the $100,000.00 Letter of Credit (reducing the amount owed to Meramec by that amount) in order to close the sale. (Tr.Vol.III pp.353-354; p.358,ln.1-11; Tr.Vol.VI p.732,ln.23-25; pp.733-734; p.768,ln.1-11; p.772,ln.7-16; Tr.Vol.VII pp.818-820).

Although not offered for the truth of the matter asserted,[17] Joel Bianco and others testified that when Fisher returned to the meeting after lunch, Mauer complained that trucks had arrived at Bianco Kawasaki to recommence the replevin.[18] (Tr.Vol.III pp.458-460; Tr.Vol.VII p.825,ln.18-25). Without further negotiation, Mauer abruptly walked out of the meeting which immediately disintegrated thereafter. (Tr.Vol.III p.460,ln.8-24; Tr.Vol.VII p.824,ln.4-24). Bianco's additional $50,000.00

[17]Neither Mauer nor Fisher testified at trial. (Tr.Vol.VI p.682,ln.21-24).

[18] Although the Trial Court sustained Meramec counsel's objection to the purported out-of-court statements by Mauer, the Trial Court and the parties were later unclear whether subsequent references to Mauer's statements were covered by the objection or merely intended to show that the meeting dissolved thereafter. (Tr.Vol.VI p.682,ln.2-6, 21-24; Tr.458,ln.3-7).

(which, with Bombardier's offer, would have provided Meramec $100,000.00 of the $104,000.00 it sought) was never mentioned. (Tr.Vol.VI p.772,ln.7-16).

Meramec did not dispute that it placed a truck in the parking lot of Bianco Kawasaki and testified that its personnel were directed not to enter the premises or recommence the replevin unless Meramec directed it to. (Tr.Vol.III p.460,ln.6-7; Tr.Vol.VI p.681,ln.9-18; pp.734-735; pp.741-742) Although Deputy Sheriff Curley Hines made conflicting statements[19] regarding the time the replevin recommenced on October 8th, an officer from Meramec and another representative present at Bianco Kawasaki testified that the replevin was not recommenced until the representative received a telephone call from the officer after the parties had ceased negotiations on the afternoon of October 8th. (Tr.Vol.VI p.743,ln.7-21; pp.744-747; Tr.Vol.VII p.827,ln.9-13; pp.858-859).

In the aftermath, Polaris presented its sight draft to Meramec drawing on the $45,000.00 Letter of Credit, which Meramec paid on October 14, 1997. (Tr.Vol.III p.304,ln.22-25; p.305,ln.1-10; Tr.Vol.VI p.747,ln.22-25; p.748 ln.1-7; Tr.Ex.38). On October 16, 1997, Meramec filed a Motion for Redelivery whereby the Circuit Court

[19] In refusing Bianco's request for punitive damages, the Trial Court noted at sidebar that it was "patently obvious" that Deputy Sheriff Hines' was "confused" regarding counsels' questions regarding the timing of the replevin. "He said it both ways." (Tr.Vol.VII p.861,ln.17-23).

granted Meramec leave to return certain items of inventory in which Kawasaki held a superior lien. *Meramec,* 14 S.W.3d at 686. (Tr.Vol.V p.632,ln.14-24). In 1998, Bianco eventually did close the asset sale with a related Mauer and Fisher entity and settled or consented to judgment with the manufacturers. (Tr.Vol.III pp.461-465,ln.1-9; LF 214-215; 239-240).

Bianco Alleges Fraud in Connection with the Replevin

Although Meramec completed the replevin on October 8th, Meramec's remaining claims on the promissory notes for the SBA Loan and the Ski Nautique Loan were still pending in the Circuit Court. On or about November 17, 1997, counsel for Bianco reviewed the court file for the Replevin Case at the St. Louis County Courthouse finding no sheriff's return of service on Bianco. *Meramec,* 14 S.W.3d at 686, 689. One week later, on November 24, 1997, Meramec filed the sheriff's return of service (showing the petition in the Replevin Case was served on Bianco on October 6, 1997), together with a Motion for Interlocutory Default Judgment against Bianco on the note counts. *Meramec,* 14 S.W.3d at 686-687, 689. Bianco did not file an answer to the petition or response to the motion. *Id.* The motion was granted and a default judgment was entered. *Id*. Although Bianco did not dispute that the petition was served, Bianco asserted only that neither it, nor counsel, ever received notice of any pleadings in the Replevin Case following the October 8th meeting, including, the motion or default judgment. *Id*.

On December 10, 1997, Joel Bianco, Bianco Kawasaki and Frances Love filed the instant lawsuit claiming in Count I -- Breach of Contract, Count II -- Fraudulent Misrepresentation, Count III – Conversion, and Count IV – Tortious Interference with a Contract. *Meramec,* 14 S.W.3d at 687. Count I and Count III were not submitted to the jury at Bianco's request; Frances Love dismissed her claims in Count II. (Tr.Vol.VI p.687,ln.18-20; Tr.Vol.VII p.867,ln.6-14; p.868,ln.5-13). The court denied Bianco's request to submit the issues of punitive damages to the jury. (Tr.Vol.VII pp.865,ln.9-18; 873,ln.7-20). On November 19, 1999, the jury returned a verdict in favor of Bianco on Count II and awarded Bianco damages in the amount of $675,000.00 and returned a verdict in favor of Meramec on Count IV, on which the Trial Court entered judgment (the "Judgment"). (LF 109). Meramec timely appealed the judgment of the Trial Court to the Court of Appeals for the Eastern District of Missouri. (LF 147).

On September 4, 2001, the Eastern District vacated the judgment of the Trial Court and remanded for dismissal without prejudice holding that Bianco's claims were compulsory counterclaims in the Replevin Case. As such, the Trial Court lacked subject matter jurisdiction, which could not be waived. Finding this issue dispositive, the Eastern District did not rule on the remaining points of the appeal and denied Bianco's subsequent Application for Transfer.

Bianco then timely filed its Application for Transfer with this Court which

agreed to hear and adjudicate the issues set forth herein.

POINTS RELIED ON

I.

THE TRIAL COURT ERRED IN DENYING MERAMEC'S TWO (2) MOTIONS FOR DIRECTED VERDICT, MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR NEW TRIAL AND ENTERING JUDGMENT AGAINST MERAMEC ON THE CLAIM OF FRAUDULENT MISREPRESENTATION, BECAUSE MISSOURI LAW AND COURT RULES CLEARLY STATE THAT BIANCO'S CLAIM AROSE FROM THE SAME TRANSACTION OR OCCURRENCE AS THOSE PLED IN A PRIOR REPLEVIN PROCEEDING (INITIATED BY MERAMEC AGAINST BIANCO) DEPRIVING THE TRIAL COURT OF SUBJECT MATTER JURISDICTION OVER THE CLAIMS IN THE INSTANT CASE. THE FACTS UNDERLYING BIANCO'S CLAIM OF FRAUDULENT MISREPRESENTATION IN THE INSTANT CASE (NAMELY, ALLEGED REPRESENTATIONS IN CONNECTION WITH MERAMEC'S REPLEVIN OF BIANCO'S PERSONALTY) OCCURRED IMMEDIATELY AFTER MERAMEC FILED A REPLEVIN ACTION AGAINST BIANCO, THUS, REQUIRING BIANCO TO ASSERT THE CLAIM AS A COMPULSORY COUNTERCLAIM IN THE PRIOR REPLEVIN PROCEEDING PURSUANT TO RULE 55.32 OF THE MISSOURI RULES OF CIVIL PROCEDURE. THE

TRIAL COURT'S ACTIONS CONSTITUTED REVERSIBLE ERROR, AND THE JUDGMENT SHOULD BE VACATED OR REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS.

Authorities Relied Upon:

Meramec Valley Bank v. Joel Bianco Kawasaki Plus, Inc, et al., 14 S.W.3d 684 (Mo.App. E.D. 2000)

Rell v. Burlington Northern Railroad Company, 976 S.W.2d 518 (Mo.App. E.D. 1998)

Jewish Hospital of St. Louis v. Gartner, 655 S.W.2d 638 (Mo.App. E.D. 1983)

II.

THE TRIAL COURT ERRED IN DENYING MERAMEC'S TWO (2) MOTIONS FOR DIRECTED VERDICT, MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR NEW TRIAL AND ENTERING JUDGMENT AGAINST MERAMEC FOR FRAUDULENT MISREPRESENTATION, BECAUSE UNDER MISSOURI LAW, BIANCO FAILED TO SATISFY THE ELEMENTS OF FRAUDULENT MISREPRESENTATION BY SUBSTANTIAL EVIDENCE AND FAILED TO MAKE A SUBMISSIBLE CASE FOR THE JURY, IN THAT, ITS WITNESSES' TESTIMONY AND DOCUMENTS OFFERED AT TRIAL

FAILED TO DEMONSTRATE THAT MERAMEC'S ALLEGED REPRESENTATIONS WERE STATEMENTS OF FACT OR WERE ANYTHING MORE THAN A PROMISE, THAT THEY WERE FALSE OR THAT MERAMEC KNEW OF THEIR FALSITY, THAT MERAMEC INTENDED THAT THEY SHOULD BE ACTED UPON BY BIANCO IN THE MANNER REASONABLY CONTEMPLATED, THAT MERAMEC INTENDED THAT BIANCO RELY OR THAT BIANCO HAD A RIGHT TO RELY ON THEM, THAT THEY WERE MATERIAL OR THAT BIANCO SUFFERED ANY QUANTIFIABLE DAMAGES AS A RESULT THEREOF. THE TRIAL COURT'S ACTIONS CONSTITUTED REVERSIBLE ERROR, AND THE JUDGMENT SHOULD BE REVERSED AND REMANDED FOR A NEW TRIAL OR REMITTUR.

Authorities Relied Upon:

Thoroughbred Ford, Inc. v. Ford Motor Company, 908 S.W.2d 719, 732 (Mo.App. E.D. 1995)

Titan Construction v. Mark Twain Bank, 887 S.W.2d 454, 459 (Mo.App. W.D. 1994)

Hueseman v. Medicine Shoppe International, Inc., 844 S.W.2d 128, 130 (Mo.App. E.D. 1993)

Mo.R.Civ.P. 55.32

III.

THE TRIAL COURT ERRED IN OVERRULING MERAMEC'S OBJECTIONS TO BIANCO'S JURY INSTRUCTIONS, DENYING JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR NEW TRIAL AND ALLOWING JUDGMENT TO BE ENTERED AGAINST MERAMEC ON THE CLAIM OF FRAUDULENT MISREPRESENTATION, BECAUSE BIANCO'S VERDICT DIRECTOR IN INSTRUCTION NO. 7 SUBMITTED TO THE JURY WAS PLAINLY ERRONEOUS UNDER MISSOURI LAW, IN THAT: THE INSTRUCTION ASSUMED A DISPUTED FACT REGARDING THE MATERIALITY OF THE ALLEGED REPRESENTATIONS; THE INSTRUCTION WAS CONFUSING AND MISLEADING WITH REGARD TO THE MULTIPLE ALLEGED MISREPRESENTATIONS; THE INSTRUCTION ASSUMED DISPUTED FACTS AND WAS CONFUSING AND MISLEADING IN THAT IT SET FORTH ALLEGED MISREPRESENTATIONS THAT THE UNDISPUTED EVIDENCE PROVED OCCURRED AFTER MERAMEC ALLEGEDLY INDUCED BIANCO TO PROVIDE ADDITIONAL COLLATERAL. THE TRIAL COURT'S ACTIONS CONSTITUTED PLAIN ERROR, AND THE JUDGMENT SHOULD BE REVERSED AND REMANDED FOR A NEW TRIAL.

Authorities Relied Upon:

Kansas City v. Keene Corporation, 855 S.W.2d 360, 369 (Mo. 1993)

Jenkins v. Keller, 579 S.W.2d 166, 167-168. (Mo.App. S.D. 1979)

Peaker v. Stokes, 1999 WL 304343 *4-6 (Mo.App. S.D. 1999) *transfer granted* Aug. 1999, *dismissed* Oct. 1999, *reh'g and transfer denied*

MAI 23.05

ARGUMENT

I.

THE TRIAL COURT ERRED IN DENYING MERAMEC'S TWO (2) MOTIONS FOR DIRECTED VERDICT, MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR NEW TRIAL AND ENTERING JUDGMENT AGAINST MERAMEC ON THE CLAIM OF FRAUDULENT MISREPRESENTATION, BECAUSE MISSOURI LAW AND COURT RULES CLEARLY STATE THAT BIANCO'S CLAIM AROSE FROM THE SAME TRANSACTION OR OCCURRENCE AS THOSE PLED IN A PRIOR REPLEVIN PROCEEDING (INITIATED BY MERAMEC AGAINST BIANCO) DEPRIVING THE TRIAL COURT OF SUBJECT MATTER JURISDICTION OVER THE CLAIMS IN THE INSTANT CASE. THE FACTS UNDERLYING BIANCO'S CLAIM OF FRAUDULENT MISREPRESENTATION IN THE INSTANT CASE (NAMELY, ALLEGED REPRESENTATIONS IN CONNECTION WITH MERAMEC'S REPLEVIN OF BIANCO'S PERSONALTY) OCCURRED IMMEDIATELY AFTER MERAMEC FILED A REPLEVIN ACTION AGAINST BIANCO, THUS, REQUIRING BIANCO TO ASSERT THE CLAIM AS A COMPULSORY COUNTERCLAIM IN THE PRIOR REPLEVIN PROCEEDING PURSUANT TO RULE 55.32 OF THE MISSOURI RULES OF CIVIL PROCEDURE. THE

TRIAL COURT'S ACTIONS CONSTITUTED REVERSIBLE ERROR, AND THE JUDGMENT SHOULD BE VACATED OR REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS.

A. Standard of Review

"A reviewing court has a duty to determine its jurisdiction *sua sponte*." *Chromalloy American Corp. v. Elyria Foundry Co.,* 955 S.W.2d 1, 3 (Mo.banc 1997). In doing this, a court is not restricted to the pleadings, what the trial court considered below or even what the parties now put before it. *Id*. at 3; *Rell v. Burlington Northern R. Co.,* 976 S.W.2d 518, 520 (Mo.App. E.D. 1998); Mo.R.Civ.P. 84.13(a). Moreover, when reviewing a case that allegedly lacks subject matter jurisdiction, a court must also take judicial notice of the facts and pleadings of the previously filed matter.

In this case, it is not only appropriate, but also necessary to take judicial notice of the Replevin Case. In *Rell,* the Eastern District explained that:

> . . . [A] plaintiff's failure to raise a compulsory counterclaim is usually impossible to discern from the face of a petition. **The trial court had to consider evidence of the previous lawsuit between [the parties] to determine whether it had jurisdiction to proceed**. Indeed, Driver does not dispute the accuracy of Railroad's evidence. He only mistakenly asserts that it was procedurally improper for the court to consider it when it did.

Rell, 976 S.W.2d at 520 (emphasis added). In the footnote accompanying this quote, the Eastern District further stated:

> Although the trial court noted it would 'not consider matters outside the pleadings' to resolve Railroad's motion to dismiss, it obviously had to consider the pleadings appended to Railroad's motion to find it had no jurisdiction to adjudicate Driver's claim against Railroad . . . it was entirely appropriate for the trial court to do so.

Id. at 520. By attaching a copy of the Petition from the Replevin Case (with the exhibits) to its Response to Meramec's Motion to Dismiss for lack of subject matter jurisdiction, even Bianco recognized the need to have the record from the prior proceeding before the Trial Court. (LF 61-79).

After reviewing all of the pleadings and all of the evidence in the light most favorable to the verdict, the Trial Court undeniably lacked subject matter jurisdiction in the instant case. The facts underlying Bianco's claim of fraudulent misrepresentation should have been raised as a compulsory counterclaim in the Replevin Case pursuant to Rule 55.32, because they arose out of the same transaction and occurrence. *Botanicals on the Park, Inc. v. Microcode Corporation,* 7 S.W.3d 465, 467-468 (Mo.App. E.D. 1999)(motion for directed verdict); *Stewart v. Kirkland,* 929 S.W.2d 321, 322 (Mo.App. S.D. 1996)(motion for judgment notwithstanding the verdict).

B. Under Missouri Law, the Compulsory Counterclaim Rule Broadly Captures Any Claim or Defense That Is Part of the Same Transaction or Occurrence.

Few rules are more entrenched in our common law system than the one requiring parties to bring all of their related disputes before the bar to be adjudicated at one time. The rationale is self-evident: piecemeal litigation claims finite resources and serves no legitimate interest for the parties, their counsel or the courts. To avoid this, the courts generally bar subsequent actions, claims and defenses that could have been raised in earlier litigation. Whether it falls under the rubric of *res judicata*, collateral estoppel, splitting a cause of action or compulsory counterclaim, every practitioner – regardless of whether he knows the differences between these concepts – counsels his clients to raise every valid and conceivable claim or defense or risk losing it forever. As stated so succinctly by this Court, "use-it-or-lose-it." *Becker Glove International, Inc. v. Jack Dubinski & Sons,* 41 S.W.3d 885, 886 (Mo.banc 2001)(Wolff, J.)(distinguishing proceedings under Chapter 517 RSMo, which do not provide for *compulsory* counterclaims and, thus, do not *require* that they be raised, to Rule 55.32(a)). In this case, the Trial Court housed in St. Louis County erred by allowing Bianco to pursue fraudulent representations (made in connection with the Replevin Case) while Bianco was simultaneously appealing the previously-filed Replevin Case downtown.

Missouri Court Rule 55.32(a), commonly referred to as the "Compulsory

Counterclaim Rule," requires a party to state all claims it has against the other arising out of the same transaction or occurrence. *Rell v. Burlington Northern Railroad Company,* 976 S.W.2d 518, 520-521 (Mo.App. E.D. 1998)*; Neenan Company v. Cox,* 955 S.W.2d 595, 599 (Mo.App. W.D. 1998) (abuse of discretion to deny leave to file compulsory counterclaim which would unnecessarily result in lack of subject matter jurisdiction in subsequent suit); *Evergreen National Corp. v. Killian Construction Company,* 876 S.W.2d 633, 635 (Mo.App. W.D. 1994); *Jewish Hospital of St. Louis v. Gartner,* 655 S.W.2d 638, 640 (Mo.App. E.D. 1983) (writ in prohibition absolute over compulsory counterclaims that should have been raised in prior litigation). "Transaction" in the context of compulsive counterclaims is to be interpreted "'in its broadest sense' to encompass all claims connected by a logical nexus." *Evergreen,* 876 S.W.2d at 635 (tort action should have been brought in previous mechanics' lien action where expressly contemplated by parties in contract), quoting *Myers v. Clayco State Bank,* 687 S.W.2d 256, 261 (Mo.App. W.D. 1985) (emphasis added); *Jewish Hospital,* 655 S.W.2d at 640-641. "[It] is a means of bringing together all logically related claims into a single litigation, through the penalty of precluding the later assertion of omitted claims." *Neenan,* 955 S.W.2d at 599, quoting *Evergreen,* 876 S.W.2d at 635 (emphasis added). The subsequent court is deemed to lack subject matter jurisdiction over the compulsory counterclaim that should have been raised in the prior lawsuit. *Choate v. Hicks,* 983 S.W.2d 611, 613 (Mo.App. S.D. 1999); *Rell,*

976 S.W.2d at 520; *Evergreen,* 876 S.W.2d at 635; *Jewish Hospital,* 655 S.W.2d at 640-641.

For example, in *Jewish Hospital,* the Eastern District queried whether a patient's medical negligence claim arose out of the same transaction as the hospital's prior claim for payment of those very medical services. 655 S.W.2d at 640-641. The court found that the statement itself answered its question particularly where the latter counterclaim would have provided a defense to the former. *Id.* As a result, the court held that the Compulsory Counterclaim Rule imposed an absolute bar whereby the court in the subsequent action lacked subject matter jurisdiction over the omitted claims.[20] *Id.* (prohibition was appropriate).

A Western District case is particularly on point. In *Myers v. Clayco State Bank,* three individuals personally guaranteed a corporation's promissory note to a bank. 687 S.W.2d at 259. The bank brought actions against the guarantors by attachment (against two of the guarantors in Johnson County, Kansas and the third in Clay

[20]"Lack of subject matter jurisdiction . . . is not an affirmative defense that must be raised at the first opportunity or be waived." *Rell,* 976 S.W.2d at 520; Mo.R.Civ.P. 55.27(g)(3). A motion to dismiss for lack of subject matter jurisdiction is a unique creature that cannot be waived and may be raised for the first time at any time -- even on appeal. *Rell,* 976 S.W.2d at 520 (emphasis added); Mo.R.Civ.P. 84.13(c).

County, Missouri). "The subject of each suit was the obligation of the promissory note and the claim to recover the amount of the guarantee in default." *Id.* The attachments resulted in foreclosure and liquidation of property in which the guarantors had equity. While these cases were pending, the bank brought an additional action against all guarantors on their promissory note guarantees in Platt County, Missouri whereby summary judgment was entered in favor of the bank. The attachment suits were thereafter dismissed.

The guarantors then filed another action asserting, among other things, fraudulent misrepresentation, alleging that the bank agreed to a moratorium on the note but did not intend to honor a proposed liquidation plan and instead filed the attachment suits against the guarantors. *Id.* at 259. The guarantors also raised allegations of outrageous conduct based on misrepresentations that the bank "lured the guarantors into a sense of false security and were given to enable the [Bank] time to bring suits on the note -- and that these acts were done solely to harm the guarantors." *Id.* The remaining counts were founded upon abuse of process and prima facie tort. *Id.*

The trial court dismissed the guarantors' lawsuit, holding that the claims were compulsory counterclaims that should have been raised in the bank's prior action on the promissory note guarantees in Platte County. *Id.* The Western District affirmed by adopting the reasoning set forth by the Missouri Supreme Court in *Cantrell v. City*

of Caruthersville, 221 S.W.2d 471, 474 (1949), in which this Court explained that:

- *Transaction* imports a pliable meaning and may encompass a series of occurrences, and depends in application, not so much upon the immediacy of connection, as upon logical relationship.
- *Claim* [of either the original pleader or of the counterpleader] refers not to the form of the action, but 'to the underlying facts combined with the law giving a party *a right to a remedy* of one form of another based on the claim.'
- *Subject matter of the claim* does not equate merely with the cause of action, nor the object of the action, but rather describes the composite of 'physical facts, *the things real* or personal, the money, lands, chattels, *and the like, in relation to which the suit is prosecuted*.'
- Thus, the term *transaction* extends to include 'all of the facts and circumstances which constitute the foundation of a claim . . . *all the facts and circumstances out of which the injury complained of arose.*'
- Thus, also, the compulsory counterclaim Rule 55.32(a) is designed to bring into a single litigation all logically related claims on penalty of preclusion of a later assertion of any claim omitted.

Myers, 687 S.W.2d at 261-262 (emphasis in original; bullets added), quoting *Cantrell*, 221 S.W.2d at 474. From this foundation, the court held that "the *transaction* from which the [bank's] *claim* arises encompasses not only the right to sue on the

promissory note guarantees, but also the suit which gives efficacy -- and hence, remedy, to the right." *Myers,* 687 S.W.2d at 261. The court therefore refused to cleave the bank's right to sue under the notes from the remedy. It found that the guarantors' later claims of misrepresentation and the like similarly arose from the same transaction that formed the basis of the bank's prior action. *Id.*

C. Bianco's Fraudulent Misrepresentation Claim was a Compulsory Counterclaim in the Replevin Case.

The factual similarities between *Myers* and the instant case make comparison inescapable, but it is the analysis used that should leave little doubt that Bianco's claims in the instant case were compulsory counterclaims in the Replevin Case. As in *Myers*, to define the scope of a transaction, an action on the notes cannot be severed from the remedy sought. Bianco's claims in the instant suit arose as a result of Meramec's rights and Bianco's liabilities under the notes and security agreements averred in the Replevin Case. (LF 8-17; 90; 342-248). Specifically, the claims arose as a result of the "traumatic events" on October 6, 1997 -- Meramec's replevin. *Meramec,* 14 S.W.3d at 686, 689 ("Further, defendants later filed a separate action arising out of the transaction or occurrence pled in the notes and replevin action."). Therefore, Bianco was required to raise its claims in the instant case as compulsory counterclaims in the Replevin Case pursuant to Rule 55.32.

The Replevin Case was filed on October 3, 1997.[21] (LF 341) Meramec's claims in the Replevin Case asserted breach of the SBA Loan and the Ski Nautique Loan agreements entitling it to, among other things, monetary damages and replevin of the collateral from which it was granted an Order of Delivery. (LF 341) Meramec sought expedited relief in the Replevin Case, in part, because it claimed "[t]he Collateral [was] movable, readily marketable and/or easily damaged, and Meramec [was] in danger of losing said property unless immediate possession of it [was] obtained or [was] otherwise secured." (LF 344). Arguably, if Meramec had obtained additional security, its reason to move in an *ex parte* fashion would have been obviated or diminished.

Instead, Meramec executed the Order of Delivery. It then entered into the Standstill Agreement with Bianco whereby the Bank temporarily stayed its replevin to allow it and Bianco's other creditors to meet and attempt to sell Bianco Kawasaki's assets to the proposed buyers, Fisher and Mauer. (Tr.Ex. 36). When the meetings failed and Meramec recommenced the replevin (regardless of whether you believed one occurred before the other), Bianco claimed injury.

All of the allegedly wrongful acts complained of by Bianco in the instant case occurred on October 6, 7, and 8th -- long before the answer was due in the Replevin

[21] Service is not at issue. In fact, the return of service was filed prior to the date Bianco filed the petition in the instant case. *Meramec,* 14 S.W. 3d at 686-687, 689.

Case. (LF 341); Mo.R.Civ.P. 55.25(a)(responsive pleading due 30 days later). These acts arose from the **same operative facts** set forth in the Replevin Case. *Stevinson v. Diffenbaugh Industries, Inc.*, 870 S.W.2d 851, 856 (Mo.App. W.D. 1993)("Thus, a claim which relates to the same operative facts as an opponent's claims, and which is logically related to that claim, must be asserted as a counterclaim to the opponent's claims, or not at all."). Any additional facts arose in connection with the Replevin Case (or the Order of Delivery issued therein) but are nonetheless the same *"facts and circumstances out of which the injury complained of arose." Myers*, 687 S.W.2d at 261 (emphasis in original). However, every one of Bianco's alleged representations **in the instant case** involved Meramec's right to replevin its collateral, other creditors' claims to the collateral, and a potential sale of that property. (LF 8-17; 90; 342-348). The basis for Bianco's claims **in the instant case** was that Meramec made alleged misrepresentations immediately following the commencement of the Replevin Case in order to induce Bianco to post "additional security, which [Bianco was] not obligated to do." (LF 15). Bianco's obligations (or lack thereof) to Meramec were memorialized in notes and security agreements between them, specifically, the **very instruments Meramec relied upon for relief in the Replevin Case**. *Meramec*, 14 S.W.3d at 686. If Bianco was not obligated to provide the additional security and was attempting a wrongful replevin, then Bianco was required to raise these issues as compulsory counterclaims in the Replevin Case. Failing to raise them therein, they

were barred in this proceeding. *Choate v. Hicks*, 983 S.W.2d at 613; *Rell*, 976 S.W.2d at 520; *Evergreen*, 876 S.W.2d at 635; *Stevinson*, 870 S.W.2d at 856; *Jewish Hospital*, 655 S.W.2d at 640-641.

Bianco's own Statement of Facts to the Eastern District in the instant case confirms the degree to which the two cases were intertwined. After arguing that Meramec provided an "incomplete" recitation of the facts, Bianco explained that, "(i)t was essential to an understanding of what took place on October 6, 7 and 8, 1997 to understand this complexity [of Bianco's financing arrangements], and much time was spent explaining it to the jury." (Respondent's E.D. Brief, pp.3-4). With everything but candlelight and soft music, Bianco then harkened back to 1973 and the marriage of Joel's parents, Frances C. Love and Noel Bianco. (Respondent's E.D. Brief, p.4). It took six (6) more pages of Bianco's chronology detailing, among other things:

- The SBA Loan (Respondents' E.D. Brief, pp.4-5);
- The Ski Nautique Loan (Respondents' E.D. Brief, p.5);
- UCC-1s filed by manufacturers against the same collateral (Respondents' E.D. Brief, pp.6, 9-10);
- Letters of credit issued by Meramec for the benefit of Bianco, secured by Bianco's assets (Respondents' E.D. Brief, p.7);
- Conversations with Meramec about loans and the collateral (Respondents' E.D. Brief, pp.8-9).

These issues eventually culminated with the filing of the Replevin Case, (Respondents' E.D. Brief, p.10), and the alleged misrepresentations that followed (Respondents' E.D. Brief, p.11). In other words, Bianco spent nearly half of its expanded Statement of Facts discussing items it deemed were **absolutely essential** for a proper understanding of the claims in the instant case **but later argued that these very facts were irrelevant**. (Respondent's E.D. Brief, pp.4,34). This is precisely what the Compulsory Counterclaim Rule was intended to prevent!

It is, furthermore, undeniable that the two cases are linked by the Standstill Agreement executed between Meramec and Bianco on October 6, 1997. (Respondents' E.D. Brief, pp.13,34). The Standstill Agreement provided, in part, that in exchange for additional collateral, Meramec would temporarily stay execution of the Order of Delivery obtained in the Replevin Case. (Respondents' E.D. Brief, pp.13,34; Tr.Ex.36). In fact, it was Bianco that first characterized it as a "Standstill Agreement." (Respondents' E.D. Brief, p. 13). Presumably, Meramec agreed to **stand still on its rights under the SBA Note, the Ski Nautique Note, and the Order of Delivery entered just days before!** Again, each of the facts underlying the claims asserted in the instant case arose as a result of Meramec's rights and remedies under the notes and security agreements set forth in the Replevin Case. (LF 8-17; 90; 342-248). See *Meramec*, 14 S.W.3d at 686; *Myers*, 687 S.W.2d at 261.

As in *Myers*, the transaction from which Meramec's claim arose encompassed not only the SBA Loan and Ski Nautique Loan, but also the Replevin Action "which gives efficacy -- and hence, remedy, to the right." *Myers*, 687 S.W.2d at 261. Bianco's claims are not only logically related to those in the Replevin Action but arose as a direct result of its commencement, "standstill," and alleged improper execution of the Order of Delivery. Thus, Bianco's claims in the instant action should have been raised as compulsory counterclaims in the Replevin Case, and the Court of Appeals properly reached this conclusion.

D. No Matter How Bianco has Argued it, the Eastern District has Twice Declared that Bianco's claims were Compulsory Counterclaims in the Replevin Case.

Because Missouri courts cast a broad net with respect to potential counterclaims, it is virtually impossible for Bianco to defend its failure for not bringing its claims in this action as compulsory counterclaims in the Replevin Case. Actually, Bianco does not dispute that its claims should have been previously raised. *Meramec*, 14 S.W.3d at 688-689. To the contrary, as part of its appeal **of the Replevin Case** (that the Trial Court erred by denying its motion to set aside default judgment for good cause under Rule 75.01), Bianco argued that its claims in the instant case should have been raised as compulsory counterclaims in the Replevin Case! *Id.*

In Bianco's Statement of Facts and its first Point Relied On in the Replevin Case -- filed 11 days before trial in the instant case – Bianco argued that "Meramec either created a misunderstanding or caused one to be created relative to the further prosecution of the [Replevin Case] by . . . pleading the breach of the promissory notes and security agreements as an affirmative action in the "fraud action" and in not making any claim or defense that the fraud claims had to have been filed in the [Replevin Case] under the compulsory counterclaim provisions of Rule 55.32(a)." Appellants' Brief (Replevin Case), pp.13, 16, 19; see *Meramec,* 14 S.W.3d at 688-689; *Manzer v. Sanchez,* 29 S.W.3d 380 (Mo.App. E.D. 2000).

Based on this convenient change in position, Bianco should be estopped from now arguing otherwise, and this Court would be absolutely justified to stop its analysis right here, reverse and remand with instructions to dismiss the entire cause. The facts (as set forth by the Eastern District in the Replevin Case appeal) corroborate Bianco's former legal position that it knew (or should have known) its claims had to be filed in the Replevin Case. *Meramec,* 14 S.W.3d at 688-689.

Bianco asserted in the Replevin Case appeal that because of "traumatic events" on the day Meramec replevied the dealership collateral, Joel Bianco did not realize that he had been served with a petition and summons. *Meramec,* 14 S.W.3d at 688-689. To that extent, Bianco did not dispute proper service. *Id.* It was only over a

month after Meramec executed an Order for Delivery (and Redelivery) that counsel for Bianco decided to check the court file in the Replevin Case to determine whether Meramec had filed a return of service of the summons. *Meramec,* 14 S.W.3d at 686, 689. It had not. *Id.*

Although Bianco had knowledge that the Replevin Case was pending, that Meramec had taken possession of the collateral, that the petition contained additional counts on promissory notes (counsel presumably looked at the petition contained in the court file if it did not have a copy already), and that Joel Bianco thought he might have been served, **Bianco chose not to file a responsive pleading or do anything else (in a case seeking damages in excess of $100,000.00) relying completely on the lack of the sheriff's return of service which was appropriately filed the following week**.[22] *Meramec,* 14 S.W.3d at 686, 689; see Mo.R.Civ.P. 54.22(a) (return may be filed any time).

Thereafter, Meramec sought and received an interlocutory order of default. *Meramec,* 14 S.W.3d at 686-687, 689. More than two weeks later, counsel for Bianco

[22]Meramec filed the sheriff's return of service the following week on November 24, 1997, the same day it sought an interlocutory order of default. *Meramec,* 14 S.W.3d at 686, 689; Mo.R.Civ.P. 54.21.

returned to the courthouse, apparently did not check the court file again[23] but, instead, filed its own lawsuit – this one alleging fraudulent misrepresentation and other claims related to the Replevin Case. *Meramec,* 14 S.W.3d at 687, 689.

So, although Bianco did not dispute service, its counsel had reviewed the court file, claimed it had not received any other pleadings -- **including a dismissal of any kind** -- and had filed its own lawsuit raising fraud claims it admits should have been brought in the pending Replevin Case, Bianco believed it could circumvent the Compulsory Counterclaim Rule until Meramec complained otherwise. (Application for Transfer, pp.5-6) Even if this tortured interpretation of the Compulsory Counterclaim Rule was correct, Meramec did notify Bianco and the Trial Court!

The Eastern District has twice declared that the facts in this case arise out of the same transaction or occurrence as those set forth in the Replevin Case. (LF 442). *Meramec,* 14 S.W.3d at 689; *Joel Bianco Kawasaki Plus, Inc. et al v. Meramec Valley Bank,* Appeal No. ED77624 (Sept.4, 2001)(p.7). The Replevin Case (following remand by the Eastern District) is still pending in St. Louis County, and Bianco has asserted a counterclaim in that case. (LF 442). In paragraph 16 of that counterclaim, Bianco alleges:

[23] Bianco's counsel would have then seen the elusive Return of Summons at that time. See *Meramec,* 14 S.W.3d at 686, 689.

> Plaintiff deliberately seized property on October 6 and 8, 1997, pursuant to the Order of Replevin, to which it knew it did not have a superior right of possession to Kawasaki Motors Finance Corporation and Bombardier Capital, Inc.

(LF 442). These facts present a unique opportunity for this Court, whereby the punitive nature of the Compulsory Counterclaim Rule does not have to fall on Bianco. This Court can now vacate the Trial Court judgment, remand for dismissal in accordance with the Compulsory Counterclaim Rule, and yet still afford Bianco an opportunity to present its claims in the pending Replevin Case -- where they belonged at the outset.[24] In its Application for Transfer, Bianco even acknowledged:

> . . . [T]he Southern District has held that "the bar of the compulsory counterclaim rule does not become complete, nor is the counterclaim wholly foreclosed, until the action proceeds to judgment." *Landers v. Smith,* 379 S.W.2d 884, 888 (Mo.App. S.D. 1964). If this is so, since the Replevin Action never proceeded to judgment, but had been reversed, the bar of compulsory counterclaim never attached.

(Application for Transfer, p.9) That is correct -- these are claims that should

[24] Of course, it should be noted that for the reasons set forth in Appellant's second point relied on, below, Bianco should not be entitled to assert these fraud claims at all.

have been raised in the Replevin Action and, by judicial fiat, Divine intervention or plain dumb luck, Bianco can still do so if this Court permits him to raise these claims.

E. The Timing of the Alleged Acts Did Not Spare Bianco From Filing its Claims as Compulsory Counterclaims in the Replevin Case.

The facts forming the basis for the counterclaim, i.e., that the alleged misrepresentations arose immediately after Meramec filed the petition in the Replevin Case, do not absolve Bianco. (LF 142). Rule 55.32(a) contains no such safe harbor. To the contrary, it states that "[a] **pleading** shall state as a counterclaim any claim that **at the time of serving the pleading the pleader has** against any opposing party . . ." (emphasis added). It does not speak in terms of filing the petition. But see *Port v. Maple Tree Investments, Inc.*, 900 S.W.2d 3, 5 (Mo.App. W.D. 1995), following *Beasley v. Mironuck*, 877 S.W.2d 653, 655 (Mo.App. E.D. 1994).

Missouri courts have interpreted "pleading" in Rule 55.32(a) to mean the responsive pleading, and have required a party to file all counterclaims that have "matured" by the time the responsive pleading is due. *Port*, 900 S.W.2d at 5; *Beasley*, 877 S.W.2d at 655-656. In *Beasley*, the Eastern District held that a subsequent action for a prevailing defense counsel's attorney's fees arose at the time counsel was retained in the preceding lawsuit. That the final amount owed was not ascertained

until the end of the proceedings (or when the lien was later filed) did not alter the analysis. Equating "matured" to "accrued" (as in the context of the statute of limitations), the court held that "a counterclaim has accrued and is fully matured when the damage resulting therefrom is sustained and is capable of ascertainment." *Id.*

The Replevin Case was filed on October 3, 1997. (LF 341) A responsive pleading would have been due thirty (30) days after service. The facts underlying Bianco's claims in the instant case occurred on October 6-8, 1997. *Meramec*, 14 S.W.3d at 686, 689. Even assuming immediate service in the Replevin Case, Bianco's claims in the instant case would have matured prior to the date the responsive pleading was due. Thus, Bianco's claims against Meramec should have been brought as compulsory counterclaims in the Replevin Case. *Id.* By failing to raise them therein, the Trial Court in the instant case lacked subject matter jurisdiction to hear them in the instant case *ab initio*.

F. When Bianco Raised the Compulsory Counterclaims is Immaterial as Long as it Raised them in the Replevin Case.

Even if Bianco failed to timely file its compulsory counterclaims in the Replevin Case, the Rules would have allowed Bianco to file them at almost any point in the proceedings. Typically, Rule 55.27(a), dealing with defenses and objections generally, requires counterclaims to be set forth in a responsive pleading. However,

Missouri courts recognize that within this short pleading period, parties may not have fully developed their counterclaims and acknowledged that the failure to do so should not result in waiver. Instead, the Rules specifically provide, "When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect or when justice requires, the counterclaim may be set up by amendment by leave of court." Mo.R.Civ.P. 55.32(e). Under such language, a counterclaim should be allowed by leave at any time for any reason short of fraud.

To illustrate, the Western District in *Neenan Company v. Cox* held it was abuse of discretion for a trial court to deny a party leave to file an omitted compulsory counterclaim. *Neenan*, 955 S.W.2d at 598-599. In *Neenan*, the "triggering event" of the omitted counterclaim was an act that occurred after the petition was filed[25] but before the answer was due. *Id.* at 599. The court analyzed the non-pleader's burden in preparing for these new counterclaims proffered only nine days before trial against

[25]The petition in *Neenan* was filed in the Associate Division in which § 517.031 RSMo (1994) applied. That section provided that a counterclaim "must be filed no later than the return date and time of the summons, unless leave to file at a later date is granted by the court." *Neenan*, 955 S.W.2d at 598. Because Missouri law was otherwise silent as to the treatment of omitted counterclaims, the court held that the remaining analysis was governed by the same Missouri Rules discussed herein. *Id.*

the ultimate hardship suffered by the pleader whose claims would lack jurisdiction before any other tribunal. *Id.* It held that where the pleader knew of the triggering events prior to the deadline for the responsive pleading, this was precisely the situation for which Rule 55.32(e) [allowing leave for omitted counterclaims] was intended. *Id.* "[T]he purpose for liberally permitting amendments to pleadings is to permit matters to be pled which were overlooked or which may have been unknown to the parties at the time the original pleading was filed." *Id.*, citing *Downey v. Mitchell,* 835 S.W.2d 554, 556 (Mo.App. 1992)

That Bianco was unsure that it had been served and, thus, neglected to assert its compulsory counterclaims in the Replevin Case is a hollow argument. Bianco knew that the Replevin Case had been filed, knew of the Order of Delivery, and reviewed the court file. Whether service was obtained and when the responsive pleading was due were irrelevant. Bianco instead chose to file a separate cause of action just two months after the Replevin Case was filed. Because Rule 55.32(e) allows omitted compulsory counterclaims to be raised under virtually any circumstance, in the absence of fraud, a Missouri court would commit reversible error had it not allowed Bianco to file its compulsory counterclaims in the Replevin Case at that time.

G. The Court in the Replevin Case had Exclusive Jurisdiction over Bianco's

Claims.

The Court in the Replevin Case was the only court with jurisdiction to hear Bianco's compulsory counterclaims. *State v. Moss*, 392 S.W.2d 260, 262-264 (Mo. 1965). Bianco certainly had notice the Replevin Case was pending; Joel Bianco watched as the sheriff took possession of the collateral under the Order of Delivery. *Meramec*, 14 S.W. 3d at 686, 689. Bianco's counsel was undeniably retained and involved at that point (conducting the negotiations that led to the fraud allegations). Bianco's counsel (in the same firm) later went to the courthouse and pulled the court file where the petition (one of the few papers filed at that point) was staring counsel right in the face. *Meramec*, 14 S.W. 3d at 686, 689.

Whatever advantage Bianco sought to gain from merely reviewing the file, whether the return of service was in there is irrelevant to the compulsory counterclaim issue. See *Moss*, 392 S.W.2 at 263 ("Whether the second suit is filed before or after service of defendant in the first suit filed and whether service is obtained earlier in the first or second suit is immaterial."). The court in the Replevin Case was the only court with jurisdiction to hear Bianco's claims.

In *State ex rel. Davis v. Moss*, the Missouri Supreme Court provided a lengthy explanation of the purpose and construction of Rule 55.45(a), the predecessor to Rule 55.32, the Compulsory Counterclaim Rule. "A party can no longer avoid the impact of the compulsory counterclaim rule by bringing an independent action in another

court after the commencement of the original action but before such party files his responsive pleading." *Moss,* 392 S.W.2d at 262, quoting *State ex rel. Buchanan v. Jensen,* 379 S.W.2d 529, 531 (Mo. 1963) (trial court in barred action "has no power or authority to proceed . . . while the action first begun is pending.").

This Court held that jurisdiction lies with the court where the petition was first filed. *Moss,* 392 S.W.2d at 262. The defendant must then raise all compulsory counterclaims that arise before the responsive pleading is due. *Id.* at 263. This Court found in *Moss* that the defendant had a cause of action within the thirty-day period. *Id.* Whether a defendant is served with the petition prior to filing its second action is immaterial and would nullify the clear language of the rule. *Id.* As this Court held:

> All a defendant in the first suit would be required to do in order to avoid the compulsory counterclaim rule therein would be to hurry and file his own suit and then hide out or persuade the officer to serve process in his suit first, and [the compulsory counterclaim rule] would be inapplicable.

Moss, 392 S.W.2d at 263; *Kincannon v. Schoenlaub,* 521 S.W.2d 391, 393 (Mo. 1975)(first to file obtains exclusive jurisdiction).

Under this analysis, no other court could exercise jurisdiction over Bianco's compulsory counterclaims. Unlike the timing dilemma in *Moss* (which has since been abrogated by Rule 53.01[26]), the Replevin Case was the first filed and the first to obtain

[26] Mo.R.Civ.P. 53.01 Commencement of a Civil Action

service. *Kincannon, supra; Meramec,* 14 S.W.3d at 684-687 (Replevin Case filed October 3, 1997; service October 6, 1997; Instant Case filed December 10, 1997). However, despite knowledge of the Replevin Case and the facts set forth therein, Bianco filed the instant case two weeks after looking directly at the Replevin Case file. *Meramec,* 14 S.W. 3d at 686-687.

When Meramec filed the Replevin Case, the Trial Court obtained exclusive jurisdiction over the subject matter. *Moss,* 392 S.W.2d at 262, 264; *Kincannon*, 521 S.W.2d at 393. It was then mandatory for Bianco to raise all compulsory counterclaims therein. *Williams,* 332 S.W.2d at 32; *Fawkes*, 210 S.W.2d at 33. No other court could exercise jurisdiction over Bianco's counterclaims lest they be deemed void. *That* is the impact of jurisdiction with respect to the Compulsory Counterclaim Rule.

1. Jurisdiction May Be Used "Ambiguously," But That Doesn't Deprive Subject Matter Jurisdiction of Its Continued Force and Principle Meaning.

After raising the issue for the first time at oral argument, Bianco now complains that the Eastern District "discarded without reference" its "prior jurisdiction"

A civil action is commenced by filing a petition with the court.

(Amended April 21, 1972, effective Dec. 1, 1972.)

argument. (Application for Transfer, p.7) While failing to distinguish between the Compulsory Counterclaim Rule, *res judicata* and the like, Bianco instead attempted to fashion a type of subject matter jurisdiction that can be waived under the facts of this case. However, even after allowing Bianco to file a supplemental brief on the issue, the Eastern District did not even find it necessary to mention it in its opinion. This Court should not be distracted either.

> In its stricter sense, [jurisdiction] is used only to mean judicial authority over the subject matter and parties . . . In its broader sense, it also includes the privilege and power to grant specific relief in cases within such authority.

Lake Wauwanoka, Inc. v. Spain, 622 S.W.2d 309, 314 (Mo.App. E.D. 1981) (emphasis added). However, like *res judicata* and the Compulsory Counterclaim Rule, within a particular context 'jurisdiction' has a particular meaning. "A court's authority to adjudicate a controversy is based upon three elements: (1) personal jurisdiction; (2) subject matter jurisdiction; and (3) jurisdiction to render the particular judgment in a particular case." *Charles v. White,* 112 S.W. 545, 549 (Mo. 1908);; *Steele v. Steele,* 978 S.W.2d 835 (Mo.App. W.D. 1998).

Personal jurisdiction is a personal privilege and can be waived by the parties. *State ex rel. Lambert v. Flynn,* 154 S.W.2d 52, 57 (Mo. banc 1941). For example, a party's voluntary appearance may establish a court's jurisdiction over the party but

does not grant the court jurisdiction over the subject matter not otherwise within its realm. See *Miller v. Robinson,* 844 S.W.2d 574, 578 (Mo.App. W.D. 1992); *Furstenfeld v. Nixon,* 133 S.W.2d 340, 341 (Mo. 1910)(voluntarily waived *personal* jurisdiction by filing records and briefs).

Indeed, "[s]ubject matter jurisdiction is the court's authority to decide a defined class of cases." *Lake Wauwanoka*, 622 S.W.2d at 314, citing *Corning Truck and Radiator Service v. J.W.M., Inc.,* 542 S.W.2d 520, 527 (Mo.App. 1976). In *Lake Wauwanoka*, the Eastern District found that the appellants sought relief unsupported by the facts and pleadings. *Id.* at 314. It thereby held that the trial court was justified in denying motions based on lack of subject matter jurisdiction or failure to state a claim.[27] *Id.; Rape v. Mid-Continent Bldg. Co.,* 318 S.W.2d 519, 523-524 (Mo.App. W.D.1958)(first court acquired jurisdiction over subject matter, including, later-asserted counterclaims; motion to dismiss for failure to state a claim proper). With respect to subject matter jurisdiction, the Court denied "relief which the trial court has no 'power or privilege' to grant and to that extent, the trial court lacks jurisdiction." *Id*. at 314.

This is part of the broader third type of jurisdiction (sometimes referred to as "competency") whereby jurisdiction depends upon the "power of the court under a

[27] The defense of failure to state a claim for which relief can be granted is similarly never waived. Rule 55.27(g)(2).

public policy established by statute or otherwise." *Flynn*, 154 S.W.2d at 57. Under such circumstances, it partakes of **subject matter jurisdiction and cannot be waived** by the parties or consent. *Id.*

> If the court cannot try the question except under particular conditions or when approached in a particular way, the law withholds jurisdiction unless such conditions exist or unless the court is approached in the manner provided, and consent will not avail to change the provisions of the law in this regard.

Id. at 57. The Court in *Flynn* held that jurisdiction over the subject matter was, in fact, implicated. This is precisely the type of jurisdiction at issue in the instant case.

2. The Compulsory Counterclaim Rule Sets Forth a Recognized Public Policy Codified by Statute, Depriving a Court of Jurisdiction Over the Subject Matter.

The Compulsory Counterclaim Rule is an expression of public policy codified by statute. It aids judicial economy, discourages "slap suits" and forum shopping, and lowers the risk of inconsistent judgments. It provides confidence in prior judgments, including default judgments, by prohibiting parties from taking a second bite at the apple in order to offset a prior unfavorable result. See *Taylor v. City of Ballwin*, 859

F.2d 1330, 1333 n.7 (8th Cir. 1988)(Fed.R.Civ.P. 13 applies to default judgments); *Carteret Savings & Loan Association v. Jackson,* 812 F.2d 36, 38 (1st Cir. 1987)[28] *Greyhound v. ELUL Realty,* 973 F.2d 155, 160 (2d Cir. 1992);; Wright & Miller, § 1417.

The Compulsory Counterclaim Rule requires that parties bring all related claims before a single court at the same time barring them in any subsequent action. *Harris,* 537 S.W.2d at 639 ("forever barred"); *Williams v. Kaestener,* 332 S.W.2d 21, 32 (Mo.App. E.D. 1960)(filing of compulsory counterclaim was "mandatory"); *State ex rel Fawkes v. Bland,* 210 S.W.2d 31, 33 (Mo.App. W.D. 1948)(former Civil Code version "mandatorily requires" a defendant to assert compulsory counterclaims in the original suit); see *Becker Glove,* 41 S.W.2d at 886 ("use-it-or-lose-it"). In derogation of a person's right to due process, it divests the court of the power and authority to adjudicate claims over the same subject matter brought before another tribunal. *Rell, supra; Evergreen, supra; Choate, supra; Jewish Hospital, supra; State ex rel. J.E.*

[28] "We note that Rule 13(a) was amended in 1946 to foreclose the 'undesirable result' that a defendant could avoid the consequences of the rule simply by initiating independent action in another court that included what would otherwise be compulsory counterclaims. (citations omitted) Exempting default judgments would provide defendants with a similar opportunity to divide up the litigation and undermine plaintiff's choice of forum." *Carteret,* 812 F.2d at 38 n.3.

Dunn, Jr. & Assoc. v. Schoenlaub, 668 S.W.2d 72, 74 (Mo. 1984)*; Moss, supra; Jensen, supra.* By definition, it relates to the power of the court over subject matter and could not be waived.

H. The Trial Court Lacked Subject Matter Jurisdiction -- Which Cannot Be Waived -- to Hear Bianco's Compulsory Counterclaims.

1. The Rules Provide a Clear Roadmap for Parties to Avoid the Pitfalls of Failing to Raise a Compulsory Counterclaim.

No magic words are necessary for a court to dismiss for lack of subject matter jurisdiction. In fact, no words are necessary at all -- a court can dismiss *sua sponte*. Rule 55.32(g)(3) states that, "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." (Emphasis added). There is frankly no dispute that Meramec raised the compulsory counterclaim defense at least three months prior to trial and again in its post-trial motions. (LF 46, 49, 51-54, 113, 131) By asserting this defense, there was more than enough case law from the Eastern District alone to inform the Trial Court that Bianco's failure to raise its claims as compulsory counterclaims in the Replevin Case deprived it of subject matter jurisdiction to hear them now. *Rell, supra; Neenan,* 955 S.W.2d at 599 (abuse of discretion to deny leave to file compulsory counterclaim which would unnecessarily result in lack of subject matter jurisdiction); *Jewish*

Hospital, 655 S.W.2d at 640-641 (writ of prohibition absolute over compulsory counterclaim that should have been raised in prior litigation); see *Stevinson,* 870 S.W.2d at 851 (" . . . must be asserted as a counterclaim to the opponent's claims or not at all.").

The Supreme Court Rules provide the foundation for these holdings. Under the Rules, subject matter jurisdiction can be raised at any time, even for the first time on appeal. Mo.R.Civ.P. 55.27(g)(3); 84.13(a). In fact, a party does not even have to raise the issue at all! A trial court or even an appellate court can question its own jurisdiction over subject matter *sua sponte*. Mo.R.Civ. P. 55.27(g)(3); 84.13(a). **If a party can raise the issue at any time or not at all, then it is impossible to discern how it could be charged with waiver for failing to raise it in a timely manner.**[29]

2. The Eastern District, the Western District and the Southern District Agree that Failure to Raise a Compulsory Counterclaim Deprives a Subsequent Court of Subject Matter Jurisdiction Over those

[29] Moreover, the Rules further provide (despite Bianco's contrary assertion) that a motion to dismiss for lack of jurisdiction (or even Bianco's failure to comply with the Compulsory Counterclaim Rule) is one of the appropriate pleadings to present the issue to the court. (Application for Transfer, p.5) See Mo.R.Civ.P. 55.27; 67.03; see *Rell, infra* (raised in motion to dismiss).

Claims.

The appellate triumvirate of the Eastern, Western and the Southern Districts are in complete accord that a court lacks subject matter jurisdiction over claims that should have been raised as compulsory counterclaims in a prior lawsuit. *Choate*, 983 S.W.2d at 613; *Rell*, 976 S.W.2d at 519-520; *Evergreen*, 876 S.W.2d at 635.

The Eastern District addressed this issue head-on in *Rell v. Burlington Northern Railroad Company* holding that failure to raise a compulsory counterclaim can be raised in a motion to dismiss for lack of subject matter jurisdiction, and is a defense that cannot be waived. *Rell*, 976 S.W.2d at 520. In *Rell*, this Court specifically addressed whether a railroad was required to preserve as an affirmative defense that an automobile driver's claim should have been raised as a compulsory counterclaim in a prior lawsuit. *Rell*, 976 S.W.2d at 520, citing *Evergreen*, 876 S.W.2d at 635 and *Schoenlaub*, 668 S.W.2d at 74.

The Eastern District held that a court lacks subject matter jurisdiction on any matter that should have been previously raised as a compulsory counterclaim. *Rell*, 976 S.W.2d at 520. "Lack of subject matter jurisdiction . . . is not an affirmative defense that must be raised at the first opportunity or be waived. Rule 55.27(g)(3). " *Id*. "Therefore, Railroad did not need to preserve its claim of Driver's failure to raise a compulsory counterclaim. The issue of subject matter jurisdiction **cannot be waived** and can be raised at any stage of the proceedings." *Id.* (emphasis added),

citing *Williams v. Williams*, 932 S.W.2d 904, 905 (Mo.App. 1996); Mo.R.Civ.P. 55.27(g)(3), 84.13(a). Thus, seeking to dismiss a proceeding for lack of subject matter jurisdiction is a unique creature that cannot be waived and may be raised for the first time at any time -- even on appeal. *Rell*, 976 S.W.2d at 520.

Similarly, Meramec simply was not required to plead (as an affirmative defense in the instant case) Bianco's failure to raise the compulsory counterclaims in the Replevin Case. *Rell, supra*. Meramec did so anyway. Meramec raised the Compulsory Counterclaim Rule as an affirmative defense (as well as *res judicata* and collateral estoppel) in its Amended Answer filed the same day as Bianco's Motion to Amend Petition. (LF 36, 46). Regardless whether or how subject matter jurisdiction was raised -- it was -- and the Trial Court lacked subject matter jurisdiction to hear Bianco's claims in the instant case.

The Western District in *Evergreen* reached the same conclusion in the face of serious policy considerations. *Evergreen*, 876 S.W.2d at 635. In a case that pitted the terms and intent of a contract against the language and policy of the Compulsory Counterclaim Rule, the Western District affirmed the trial court's decision granting a motion to dismiss for lack of subject matter jurisdiction. *Id*. Appellant Evergreen entered into a construction contract with Respondent Killian that provided that any legal proceeding would be tried in a Jackson County court. *Id.* at 634-635. Despite the language of this forum selection clause, Killian filed suit to enforce a mechanic's

lien in Stone County, the location of the project. *Id.* "Before responding to Killian's mechanic's lien action, Evergreen filed this suit in Jackson County against Killian for abuse of process, tortious interference with prospective contractual relations and fraudulent misrepresentation." *Id.* at 635.

The Western District succinctly set forth the rules and case law supporting the dismissal of Evergreen's claims for lack of subject matter jurisdiction. Foremost, it found that regardless of what the parties agreed to, they were "presumed to know the law," including, the Compulsory Counterclaim Rule "and have it in mind" when they entered into the contract. *Id.* at 635. It explained the language and the purpose of the Rule and concluded that:

> A court lacks jurisdiction if a later action is taken on a matter that should have been brought as compulsory counterclaim. See *Schoenlaub,* 668 S.W.2d at 75-76 (court could not exercise jurisdiction over a claims that should have been brought as a counterclaim in a pending action); *State ex rel Buchanan v. Jensen*, 379 S.W.2d 529 (Mo. banc 1964).

Id. at 635. The Western District, thus, held that although parties can agree to and thereafter waive contractual provisions submitting to the jurisdiction of a particular court, there was no legal authority that parties could waive compulsory counterclaims. *Id.*, see *Kenney v. Emge,* 972 S.W.2d 616 (Mo.App. E.D. 1998)(first suit filed in St. Louis County; subsequent court in St. Charles County lacked subject matter

jurisdiction under Compulsory Counterclaim Rule even though statute required original shareholder suit to be brought in St. Charles County). So, despite that Killian agreed to file in one venue but breached to file in another, **Evergreen was still required to raise its compulsory counterclaims** in the **first** proceeding under the Compulsory Counterclaim Rule. *Id.; see Moss, supra* (exclusive jurisdiction in first court). The Western District in *Evergreen* delivered a powerful message, one later adopted by the Eastern District in *Rell* and, as will be discussed, the Southern District in *Choate*, that the Compulsory Counterclaim Rule is **compulsory** and subsequent courts lack subject matter jurisdiction to hear those claims.

The Southern District, under a different factual scenario, followed the reasoning in *Evergreen*. *Choate v. Hicks,* 963 S.W.2d 611 (Mo.App. W.D. 1999), involved an appeal from a judgment denying the appellant's motion to file a First Amended Answer and Counterclaim. *Id.* at 612. Respondents filed a partition action against property in which Appellant claimed an interest under a deed dated October 1992. *Id.* Respondents claimed their interest from a deed dated April 1995. *Id.* Appellant claimed that "after the [trial] Court ruled that it [would] allow partition to proceed that [appellant] sought leave to amend to question the validity" of the April 1995 deed. *Id.* at 614-615. Appellant, in other words, realized that it needed to file a compulsory counterclaim and asked the trial court for leave to do so, which it denied. *Id.* at 612-613.

The Southern District held that the trial court committed a "palpable and obvious abuse of discretion" by denying leave. *Id.* at 613, 615. It examined three factors, including the hardship to the appellant if leave was denied. Following *Evergreen*, the Southern District concluded that refusing leave "subjected [appellant] to an obvious hardship" because a subsequent court would lack subject matter jurisdiction to hear a matter that should have been previously brought as a compulsory counterclaim. *Id.* at 613-614, following *Evergreen*, 876 S.W.2d at 635.

The Compulsory Counterclaim Rule is simple -- file the claims or lose them forever. Any other interpretation converts the Rule into a mere suggestion and invites parties to ignore it at their discretion. The Rule trumps contractual provisions (*Evergreen*), other statutes (*Kenney*), and even judicial discretion (*Choate*).

I. Even if Bianco's Failure to Raise its Compulsory Counterclaims could be Waived, Meramec Did Not Do So.

Under Bianco's theory of the case, a compulsory counterclaim is no longer compulsory; the Compulsory Counterclaim Rule is no longer a rule; and subject matter jurisdiction can now be waived. Even if the Sun now rises in the West, the facts still demonstrate that Meramec did raise Bianco's failure to assert its compulsory counterclaims in this case.

The record shows that in August 1997, Bianco filed an Amended Petition. (LF

3, 36). Leave was not granted to file this Amended Petition until November 15, 1997, the first day of trial. (LF 38). Indeed, Meramec had an absolute right to file its response to the amended pleading pursuant to Rule 55.33(a), and could do so at trial. Meramec filed its Amended Answer and Affirmative Defenses as well as a Motion to Dismiss (its first) right behind Bianco in August, both of which argued that Bianco's claims were absolutely barred because of its failure to raise the issues as compulsory counterclaims in the Replevin Case. (LF 3, 39, 48). Bianco did not seek to strike either pleading. Instead, the record shows that Bianco filed a Response to the Motion to Dismiss the same day that the Amended Petition was filed. (LF 3, 56). Incredibly, all of this took place three (3) months before trial. As a matter of law, Meramec could not and did not raise this as a "stealth defense".

Bianco was obviously aware of and had an opportunity to respond to Meramec's compulsory counterclaim defense, even before the response was due. (LF 3,56) Mo. R. Civ. P. 55.33(a). By Meramec's assertion of this defense over three (3) months before trial, Bianco can hardly claim it was prejudiced in any way with respect to the trial proceedings. In fact, Bianco went out of its way to point out to the Eastern District that it did not request any of the four (4) trial continuances. (Respondents' Brief E.D. p.38 n.28). Meramec again raised the compulsory counterclaim defense in its post-trial motions. (LF 4, 113, 116, 126-131). Although not even required, the magic words Bianco seeks were there -- the pleadings, the rules, and the cases that all

state that failure to raise a compulsory counterclaim deprives a court of subject matter jurisdiction.[30]

Prior to and following trial in this case, Meramec repeatedly alerted Bianco and the Trial Court that Bianco's claims were barred because they should have been brought as compulsory counterclaims in the Replevin Case. (LF 46, 60, 113-114; 126-131; 142-143). Even in the Replevin Case appeal, the Eastern District agreed that Bianco's claims in **this proceeding** were part of the same transaction or occurrence raised in the Replevin Case. *Meramec*, 14 S.W.3d at 689. Indeed, Judge Simon authored the opinion in the Replevin Case appeal agreeing with Bianco that these were compulsory counterclaims and again heard the instant appeal whereby Bianco argued they were not. (Respondents' Brief E.D. pp.31-35; Appellants' Brief (Replevin Case), pp.13,16,19); see *Meramec,* 14 S.W.3d at 668-689. Waiver simply is not at issue here.

Admittedly, the question remains why neither side raised these compulsory counterclaims earlier (why Bianco did not raise them after it reviewed the court file

[30] In its appeal of the Replevin Case, Bianco argued before the Eastern District (11 days before the trial in the instant case began) that Meramec "created a misunderstanding" in the Replevin Case by not raising the compulsory counterclaim defense in the instant case. Appellants' Brief (Replevin Case), pp. 13, 16, 19; see *Meramec,* 14 S.W.3d at 688-689.

in the Replevin Case in November 1997; why Meramec did not raise the subject matter jurisdiction defense until August 1999). However, as a matter of law, such speculation is **absolutely irrelevant** to the inquiry before this Court. *Moss, supra; Kincannon, supra.* As the Eastern District put it:

> But the mischief here is of [Bianco's] own making. Although certainly [Meramec] did the court no favor by its tardy invocation of the compulsory counterclaim rule, the original sin was [Bianco's in its separate filing of an obvious counterclaim. The tragic waste of judicial resources witnessed here is among the evils the compulsory counterclaim rule is designed to avoid. Had [Bianco] heeded the rule's injunction, it would not now be bereft of its vanishing verdict.

Joel Bianco Kawasaki, (Slip Opinion p.10).

J. Bianco's Reliance upon a Case that Never Mentions the Compulsory Counterclaim Rule or Subject Matter Jurisdiction is Obviously Misplaced and does not Support Bianco's Argument to Overrule this Court's Decisions that are Wholly on Point.

Bianco's argument that Meramec's compulsory counterclaim defense -- which did not attack the merits of the claims but the Trial Court's subject matter jurisdiction to hear them -- was a "stealth defense" is misplaced. (Petition for Transfer, p.5) To

support its argument, Bianco needs this Court to disregard numerous court decisions (*Rell, Choate, Evergreen, Jewish Hospital, Kenney, Becker Glove, Jensen, Moss, Kincannon* to name a few) and Supreme Court Rules. Specifically, Bianco contends that *Rell* was silently overruled by *66, Inc. v. Crestwood Commons Redevelopment Corporation*, 998 S.W.2d 32 (Mo. 1999)(Wolff, J.). (Petition for Transfer, p.5) *66, Inc.* is wholly distinguishable from *Rell* as well as the instant case. Foremost, 66, Inc. never mentions compulsory counterclaim, never mentions subject matter jurisdiction and lacked any facts to support either.

66, Inc. originated from a condemnation action. 66, Inc. was the former owner of real property located in Crestwood on which it operated the 66 Drive-In Theatre. Crestwood Commons Redevelopment Corporation ("Crestwood Commons") was formed and owned by a joint venture general partnership comprised of Hycel Partners III, L.P. ("Hycel") and Schnuck Markets, Inc. ("Schnuck"). Crestwood Commons brought an action in order to condemn and redevelop the 66, Inc. property as a "blighted area" pursuant to Chapter 353 RSMo (the "First Lawsuit"). Just prior to a trial following remand, Crestwood Commons abandoned the condemnation whereby 66, Inc. filed and was granted a motion for an award of interest. However, 66, Inc. was unable to collect on the award due to the fact that Crestwood Commons was a shell without any assets. *66, Inc.*, 998 S.W.2d at 37.

While the motion for interest was pending, 66, Inc. filed a lawsuit against

Crestwood Commons and the City of Crestwood seeking specific performance as a third-party beneficiary under a redevelopment agreement[31] and against Hycel and Schnuck for common damages resulting from abandonment of the condemnation (the "Second Lawsuit"). To find a deep pocket to collect from, 66, Inc. asserted that Hycel and Schnuck were the alter egos of Crestwood Commons. *66, Inc.*, 998 S.W.2d at 37 - 38.

While the Second Lawsuit was still pending, 66, Inc. filed a *separate* "guaranty" action against Hycel and Schnuck seeking payment of the interest award. 66, Inc. asserted it was "a third-party beneficiary of the contract between the joint venture and the city by which Hycel and Schnuck guaranteed Crestwood Commons' performance of the redevelopment contract." *66, Inc.*, 998 S.W.2d at 38. 66, Inc. argued that the contract was breached by abandonment of the First Lawsuit, but the trial court dismissed the Third Lawsuit with prejudice.

On appeal and transfer of the Second Lawsuit, the Supreme Court reversed and remanded holding that 66, Inc. stated a common law claim for damages upon which the trial court's award of interest (in excess of that otherwise allowable pursuant to § 523.045) could lie. This Court then addressed whether Hycel and Schnuck were alter egos of Crestwood Commons and, thus, subject to satisfy the interest award. Holding nothing back, this Court flatly held that Crestwood had a

[31] This count was later dismissed by 66, Inc.

> . . . positive, legal duty to pay the interest judgment and any other obligations arising from the condemnation proceeding that was initiated by it. This duty was circumvented through the use of a purportedly separate corporate entity that was in reality part of a single economic unit dominated and controlled by Hycel and Schnuck.

66, Inc., 998 S.W.2d at 41. This Court made it clear that the (albeit common) use of creating an unfunded shell corporation demonstrated an "improper purpose or reckless disregard for the rights of others" that would allow judgment creditors to pierce the corporate veil as a matter of law. The Court did not simply pierce but punched a gaping hole through the corporate veil ending a common questionable real estate practice and holding Hycel and Schnuck jointly and severally liable for all of Crestwood Commons liabilities. *66, Inc.*, 998 S.W.2d at 40 - 42.

Hycel, Schnuck and (what was left of) Crestwood Commons asserted that 66, Inc.'s claims in the Second Lawsuit were barred under the doctrine of *res judicata* as a result of the dismissal with prejudice in the Third Lawsuit. They argued that 66, Inc. should have instead joined its claims pursuant to Rule 55.06. This Court explained that *res judicata*, or claim preclusion, was a "judicially created doctrine" designed to inhibit multiplicity of lawsuits. *66, Inc.*, 998 S.W.2d at 42, citing *King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints,* 821 S.W.2d 495, 501 (Mo. 1991). While acknowledging that the "four identities" of *res*

judicata had been satisfied (see discussion *infra*), the Court focussed on the inequities of allowing Hycel and Schnuck to avoid liability through assertion of this defense. This Court pointed out that 66, Inc. would not have filed the Third Lawsuit against Hycel and Schnuck[32] if they had not formed Crestwood Commons, an undercapitalized shell, in order to avoid liability. *66, Inc.*, 998 S.W.2d at 42. The Court also noted that if 66, Inc. split its cause of action (another judicially created doctrine closely related to *res judicata*, *King, supra*) by bringing the Second Lawsuit, then Hycel and Schnuck waived its defense by not complaining of it earlier. See Mo.R.Civ.P. 55.27(a)(10), 55.27(g)(1).

'"Res judicata' is not a 'stealth defense' that can be held in reserve." *66, Inc.*, 998 S.W.2d at 43. This Court explained that *res judicata* is an affirmative defense that Hycel and Schnuck did not raise until it filed its answer to 66, Inc.'s second amended petition almost a year after judgment in the Third Lawsuit. *66, Inc.*, 998 S.W.2d at 43, citing *Heins Implement Co. v. Missouri Highway and Transportation Commission*, 859 S.W.2d 681, 684-685 (Mo. 1993). While pointing out that the rules provide for seeking leave to include omitted affirmative defenses, the Court found the equities of the case militated against allowing Hycel and Schnuck to do so. *66, Inc.*, 998 S.W.2d at 43, citing *Green v. City of St. Louis*, 870 S.W.2d 794, 797 (Mo. 1994).

[32] Crestwood Commons was not a part to the Third Lawsuit. *66, Inc.*, 998 S.W.2d at 38.

First, it should be noted that nowhere does *66, Inc.* or any of the cases relied upon by Judge Wolff (a long-time professor of Civil Procedure) mention compulsory counterclaim or subject matter jurisdiction in its analysis.[33] Although the concepts of compulsory counterclaim, *res judicata*, collateral estoppel, splitting a cause of action and the like are related and often confused even by the most skilled practitioner, even the novice recalls from the first year of law school the necessity of bringing all related claims before the court and the perils of failing to do so. See Wright & Miller, Federal Practice and Procedure § 1417, p.139 (1990) ("Thus, the careful attorney can and usually will plead all of his client's claims as counterclaims if there is any reason to believe that they might be considered compulsory.")

Thus, in *King*, *Heins* and *Green*, the reader will see discussions of *res judicata*, collateral estoppel and even splitting a cause of action, each recognized as "judicially created doctrines." *66, Inc.*, 998 S.W.2d at 42; *King*, 821 S.W.2d at 501; *Heins, supra*; *Green*, *supra*. Without sounding trite, what the judge giveth, the judge can taketh away. However, the Compulsory Counterclaim Rule[34] and defenses raising lack of subject matter jurisdiction[35] are **not judicially created doctrines**. They have

[33] Moreover, Compulsory counterclaim could not have been raised in *66 Inc.* because the plaintiff, 66 Inc., brought both actions.

[34] Rule 55.32 is codified at § 509.420 RSMo.

[35] Rule 55.27(g) is codified at § 509.400 RSMo. See also Mo.R.Civ.P. 84.13,

the **force of law** and, thus, are not implicated in any of these analyses.

Res judicata and the Compulsory Counterclaim Rule are neither identical nor mutually exclusive. *Elam v. City of St. Ann,* 784 S.W.2d 330, 333 (Mo.App. E.D. 1990). The Eastern District in *Elam,* in fact, refused to collapse the two doctrines specifically holding that the issues presented before it could be disposed of on the grounds of *res judicata* alone and expressly declined to "engage in a separate compulsory counterclaim analysis." *Id*. at 334 (emphasis added). The Compulsory Counterclaim Rule is a codification of *res judicata* principles. *Beasley v. Mironuck,* 877 S.W.2d 653, 656 (Mo.App. E.D. 1994). Collateral estoppel and splitting a cause of action similarly implicate those principles, but it would be inappropriate to use the terms interchangeably.

Second, *res judicata* and collateral estoppel are specifically listed in Rule 55.08 as affirmative defenses. *66, Inc.*, 998 S.W.2d at 42; *King*, 821 S.W.2d at 502 (Blackmar, concur.); *Green*, 870 S.W.2d at 797; *Heins*, 859 S.W.2d at 685. Failure to raise a compulsory counterclaim and a court's lack of subject matter jurisdiction are not. *Rell,* 976 S.W.2d at 520. Although *res judicata* may be closely related to collateral estoppel and splitting a cause of action (and even compulsory counterclaim), they are not the same for purposes of pleading an affirmative defense, in that, pleading one does not have the effect of incorporating the other. For example, in *Heins*, the

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discussed *infra*.

court held that "listing laches, estoppel, and waiver as defenses in its answer" **did not** include *res judicata* by implication. *Heins,* 859 S.W.2d at 684-685. "*Res judicata* is a separate and distinct affirmative defense that must be specifically pleaded." *Id.*

Third, *res judicata* is functionally distinguishable from the Compulsory Counterclaim Rule. For *res judicata* to attach the separate claims must share **"four identies"**: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; and (4) identity of the quality of the person for or against whom the claim is made. *King,* 821 S.W.2d at 501; *66, Inc.*, See Appeal No. 73626 (Mo.App. E.D. Dec. 1, 1998) rev'd and remanded, *supra*. Only the second identity is clearly contained in the Compulsory Counterclaim Rule, and Missouri courts have held that the third identity is clearly not.[36] Mutuality and

[36] This Eastern District in *66, Inc.* examined the third identity stating:

> The third element requires a showing that the parties and their privies are the same in the prior litigation as in the present action. *See American Polled Hereford Ass'n v. City of Kansas City*, 626 S.W.2d 237, 241 (Mo. 1982). In the action on the guaranty, 66 sued Hycel and Schnuck to recover the interest award entered against Crestwood Commons on the theory it was a third party beneficiary to the redevelopment contract. In the present action, the only difference in the parties is 66's inclusion of Crestwood Commons as an additional defendant. Although Crestwood

identity of the parties are not requirements under the Compulsory Counterclaim Rule. See *Shinn v. Bank of Crocker,* 803 S.W.2d 621, 629-630 (Mo.App.S.D. 1990) (compulsory counterclaims should have been asserted against bank in prior action even though Bank was not a party); *Schneeberger v. Hoette Concrete Construction,* 680 S.W.2d 301, 303 (Mo.App. E.D. 1984)(plaintiff required to bring compulsory counterclaims against third-party defendant not yet party to action but over whom court could exercise jurisdiction).

Moreover, *res judicata* requires a judgment on the merits in the prior cause; the Compulsory Counterclaim Rule does not. *Walker v. Walker,* 954 S.W.2d 425, 427 (Mo.App. E.D. 1997). To the contrary, compulsory counterclaims must be raised even where the prior case is pending, and courts liberally grant leave to amend the pleadings under Rule 55.32(e) to include an omitted counterclaim which would otherwise be forever barred. *Schoenlaub,* 668 S.W.2d at 74-76; see *Neenan Co.,* 955 S.W.2d at 599 (explaining liberal leave policy for omitted counterclaims while

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> Commons was not a party to the action on the guaranty, the evidence indicates that it was entirely controlled by Hycel and Schnuck, and therefore, we conclude it was in privity with the named defendants in the prior action. Thus, the third element is satisfied.

66, Inc., Appeal No. 73626.

examining jurisdiction over counterclaims under associate circuit statutes), citing *Downey v. Mitchell,* 835 S.W.2d 554, 556 (Mo.App. 1992); *Harris v. Nola,* 537 S.W.2d 636, 639 (Mo.App. W.D. 1976)("penalty of being forever barred"). Only when the judgment is rendered in the first case does the ax fall, cutting off any right to bring the action in a subsequent lawsuit. *Landers v. Smith,* 379 S.W.2d 884, 888 (Mo.App. 1964)("the bar of the compulsory counterclaim rule does not become complete, nor is the counterclaim wholly foreclosed, until the action proceeds to judgment."). Although *res judicata* and the Complusory Counterclaim Rule strive to reach similar goals, their creation, their characterization, their operation and their effect are all distinguishable under Missouri law. Therefore, Bianco's reliance on *66, Inc.* is misplaced.

However, even if this Court rejects *Rell* (*Choate, Jewish Hospital, Kenney* and the rest) and holds that failure to raise a compulsory counterclaim is an affirmative defense, then even under *66,Inc.* (and the cases cited therein), Meramec did not waive it. Meramec raised it in a Motion to Dismiss and as an affirmative defense more than three (3) months before trial.

Despite this, Bianco wants this Court to use *66, Inc.* -- a case that never mentions subject matter jurisdiction or the failure to raise a compulsory counterclaim -- to overrule others that have held otherwise. See *Rell, supra; Choate, supra; Kenney, supra; Neenan,* 955 S.W.2d at 599 (abuse of discretion to deny leave to file

compulsory counterclaim which would unnecessarily result in lack of subject matter jurisdiction); *Jewish Hospital,* 655 S.W.2d at 640-641 (writ of prohibition absolute over compulsory counterclaim that should have been raised in prior litigation). Assuming *arguendo* that this Court carves out exceptions to codified Rules, rejects established case law, and ignores the pleadings of this case, this Court is still left holding that the Compulsory Counterclaim Rule is an affirmative defense that this Court has acknowledged does not result in waiver *per se*. *Heins, supra; Green, supra;* Mo.R.Civ.P. 55.33.

K. Failure to Raise an Affirmative Defense Does Not Result in Waiver Per Se.

Even if Meramec did fail to raise the compulsory counterclaim issue as an affirmative defense, its neglect did not waive the issue *per se*. In *Heins,* for example, the trial court granted Missouri Highway and Transportation Commission's (MHTC) motion for judgment notwithstanding the verdict that argued the claims were barred by *res judicata*. *Heins,* 859 S.W.2d at 684-685. The Missouri Supreme Court noted that MHTC first raised the defense "in an oral motion to dismiss during trial, more than five years after the filing of its answer. The issue was not preserved in the answer, nor was any motion to amend the pleadings or other filing made which would timely notify appellants of MHTC's intent to present this defense." *Heins,* 859 S.W.2d at 685, citing Mo.R.Civ.P. 55.08 (Affirmative Defenses), 55.33 (Amended and

Supplemental Pleadings). Without so holding, this Court stated that a defendant should not hold affirmative defenses in reserve. *Id*. ("Stealth defenses"). However, this Court refused to hold that MHTC had waived its affirmative defense noting that no objections were made to the timeliness of MHTC's motion to dismiss at trial or the "introduction of evidence at trial regarding the prior condemnation proceedings. Consequently, the issue is deemed to have been tried by the implied consent of the parties and must be treated as though it had been raised in the pleadings." *Heins*, 859 S.W.2d at 685, citing Rule 55.33(b). Thus, even where *res judicata* first appeared as an oral motion in the course of the trial, the Court refused to invoke a *per se* waiver rule. The Court eventually reversed on the substantive *res judicata* issues holding that MHTC's prior condemnation action did not bar plaintiffs' subsequent damage claims arising from unforeseeable flooding resulting from the construction of a bypass on the property. *Heins*, 859 S.W.2d at 685-686.

The rejection of the *per se* waiver rule was reaffirmed in *Green* where this Court considered the City of St. Louis' defense of collateral estoppel that was first raised in a motion for summary judgment three years after the action was commenced. *Green*, 870 S.W.2d at 796-797. The Missouri Supreme Court stated that collateral estoppel is an affirmative defense specifically included under Rule 55.08. It then explained that:

Before 1993, *Rule 55.08* was generally interpreted to mean that failure

> to plead an affirmative defense results in waiver of the defense. In *Heins*, this Court retreated from its previous interpretation of Rule 55.08. After *Heins*, issues not raised in the answer are simply not raised in the lawsuit. The affirmative defense of collateral estoppel is not, therefore, deemed waived, per se, in the present case.

Id. (citations omitted). This Court explained that leave to include an omitted affirmative defense should be sought and "freely given if justice requires." *Id.*, citing *Downey v. Mitchell,* 835 S.W.2d 554, 556 (Mo.App. 1992); Mo.R.Civ.P. 55.33(a). However, even where the City did not seek leave to amend, and Mr. Green objected on the grounds of waiver, the Court (balancing the rule against the favored policies of judicial expediency and economy) "would not charge a trial court with error in allowing an affirmative defense to be raised for the first time in a motion for summary judgment." *Id.* The rationale is actually quite simple -- a trial court will not grant summary judgment based on new affirmative defenses if it would not have allowed leave to amend to include those defenses. *Id.*

More recently, the Missouri Supreme Court -- again -- refused to find waiver of an affirmative defense raised only five (5) days before trial without leave or consent in *Kauzlarich v. Atchison, Topeka & Santa Fe Railway Co.,* 910 S.W.2d 254, 259 (Mo. 1995). The railroad company 's original answer neglected to raise mitigation of damages as an affirmative defense. *Id.* It did so -- for the first time -- in an amended

answer filed just five (5) days prior to trial and without leave of court or the consent of opposing counsel as required under Mo.R.Civ.P. 55.33(a). *Id.* Mr. Kauzlarich did not object to the amended answer at trial (but instead accepted the railroad's admission of liability set out in the amended answer). *Id*. He claimed on appeal that because the amended answer lacked leave or consent, it was defective and the defense was "waived." *Id.* The Missouri Supreme Court disagreed.

While agreeing that Rule 55.33(a) required leave or consent, it reminded Mr. Kauzlarich of subsection (b), which states that even when issues not raised are tried by express or implied consent, they are treated as if they had been raised. *Id*. Moreover, if amendment is, in fact, necessary in order to raise the issues, a party may file a motion "at any time, even after judgment." *Id*. quoting Mo.R.Civ.P. 55.33(b). Because Mr. Kauzlarich did not complain of these defects at trial, the Court held "Kauzlarich cannot now be heard to complain of the impropriety of Sante Fe's amended answer." *Id.*

This Court's holding in *Kauzlarich* is completely consonant with its previous decisions rejecting a *per se* waiver rule. A quick comparison shows just how far Meramec was from ever waiving the issue even as an affirmative defense. Unlike *Kauzlarich*, Bianco sought leave to file an Amended Petition more than three (3) months before trial. (LF 36) On the same day, Meramec filed its Amended Answer and a Motion to Dismiss for lack of subject matter jurisdiction and Memorandum of

Law raising, among other things, Bianco's failure to raise its claims as compulsory counterclaims in the Replevin Case. (LF 39, 48, 51) Although Bianco's Response debated the merits of Meramec's Motion and the timeliness of its assertion, Bianco notably did not move to strike the Amended Answer (or post-trial motions) raising the defense. Even if it did, the parties cannot consent to subject matter jurisdiction. Jurisdiction over these issues was exclusively had in the Replevin Case. *Moss, supra*.

Thus, even if the Compulsory Counterclaim Rule was an affirmative defense, there is no *per se* waiver of this or any other affirmative defense, and the facts of this case would completely warrant against finding waiver. The parties and the Trial Court were put on notice of the lack of jurisdiction and yet proceeded at the risk of a "vanishing verdict." *Joel Bianco Kawasaki,* Slip Opinion, p.10.

L. The Dangers of Bianco's Actions and Arguments.

Bianco has contumaciously disregarded the Compulsory Counterclaim Rule. To allow it would invite widespread piecemeal litigation -- exemplified by Bianco's own actions:

- Bianco filed this lawsuit absolutely knowing that the Replevin Case was pending;
- Bianco opposed Meramec's Motion to Dismiss based on the Compulsory Counterclaim Rule filed three months before trial;
- Eleven days before trial, Bianco successfully briefed to the Eastern District (in the

Replevin Case) that its claims were compulsory;

- Bianco then argued in the appeal of the instant case that its claims were not compulsory.

Furthermore, if a compulsory counterclaim is no longer compulsory, the Compulsory Counterclaim Rule is no longer a rule, and subject matter jurisdiction can be waived, then this Court faces the onerous task of reexamining numerous cases. See *Rell,* 976 S.W.2d 518; *Jewish Hospital,* 655 S.W.2d 638; *Evergreen,* 876 S.W.2d 633; *Choate,* 983 S.W.2d 611; *Myers,* 687 S.W.2d 256; *Stevinson,* 870 S.W.2d 851; *Schoenlaub,* 668 S.W.2d 72; *Moss,* 392 SW.2d 260. (Respondents' Supp. Brief, pp. 4,22). *Jewish Hospital* (cited in at least seven other opinions) is arguably a leading case on the breadth of the Compulsory Counterclaim Rule (§ 509.420 RSMo; Mo.R.Civ.P. 55.32), and *Rell, Evergreen, Kenney* and *Choate* directly rely upon other seminal cases for the basic premise that a court lacks subject matter jurisdiction over a claim that should have been raised as compulsory counterclaim in a prior action. *Rell,* 976 S.W.2d at 521, citing *Schoenlaub,* 668 S.W.2d at 75-76 and *Evergreen,* 876 S.W.2d at 635; *Jensen,* 379 S.W.2d 529; *Moss,* 392 S.W.2d at 261(court lacked subject matter jurisdiction to hear claim that should have been raised as compulsory counterclaim in suit filed one month earlier); *Choate,* 983 S.W.2d at 613 (omitted counterclaim was compulsory, not permissive, and would be barred if not allowed to assert it); see also *Zipper v. Health Midwest,* 978 S.W.2d 398, 410-411

(Mo.App.W.D. 1998). That is the legal effect of Bianco's argument.

The practical effect is illustrated in Bianco's Application for Transfer (p.10), where, through a set of rhetorical questions, Bianco asks why it should be held accountable for not complying with the Rules. Actually, "the proper question is:" If Bianco is not required to comply with the Compulsory Counterclaim Rule, then what would stop any defendant from filing its compulsory counterclaims in a separate action? Nothing.

As any seasoned practitioner will tell you, there are those clients (and attorneys) that prefer to be plaintiffs. There are some that like certain venues (St. Louis City verses County, for example). Maybe counsel prefers a different judge. There are an infinite number of reasons why a party might want to file its counterclaims in a separate action. Under Bianco's theory, if the other side does not raise the defense in a timely manner, the second lawsuit must proceed. When must such a defense be asserted? Under Bianco's theory, three (3) months before trial is not enough. Does it matter if the first action has proceeded to judgment or is remanded? Even asking these questions makes a compulsory counterclaim sound less and less compulsory. The Compulsory Counterclaim Rule -- which is broadly interpreted to capture all claims into a single action – would become a subjective nightmare whereby the courts are asked to examine when, where and by whom the issue was raised.

The burden in the case of the Compulsory Counterclaim Rule falls on the party who wishes to assert the claims; not the one who must defend against them. Bianco queries, "Who would enter an appearance and file a counterclaim in a case where there was no service recorded with a court after six weeks have passed, and no apparent activity in the file?" (Application for Transfer, p.10) Well, maybe no one, but in terms of the Compulsory Counterclaim Rule, it is irrelevant -- that is where the counterclaims belonged; that court, alone, had jurisdiction to hear them. That Bianco chose to file another petition and pay another filing fee was its mistake. The Compulsory Counterclaim Rule is clear. There is no legal, equitable or logical basis to change the Rule to accommodate Bianco's actions. To do otherwise would invite chaos.

M. Conclusion.

No matter how thin you make a pancake, it always has two sides. Meramec and Bianco may have their own theories on how two actions involving the same transaction and occurrence worked their way through two courts, but the answer at this point is largely irrelevant. Appealing a case in which the Trial Court never had jurisdiction and should have been dismissed at the outset is not a high point for any court, but parties should not convolute the legal issues and risk setting poor precedent.

The Compulsory Counterclaim Rule is well established and understood, in part,

because the penalty is so severe. Bianco and the Eastern District -- twice -- have acknowledged that Bianco's fraudulent misrepresentation claim in this case arose from the same transaction or occurrence set forth in the previously filed Replevin Case. Thus, it should have been raised as a compulsory counterclaim therein. Under such circumstances, Missouri law clearly holds that omitted compulsory counterclaims are barred in subsequent litigation. The Trial Court, without subject matter jurisdiction to hear Bianco's fraud claim in the instant case, erred by denying Meramec's motions prior to and following trial. Therefore, Meramec respectfully requests this Court to vacate the Judgment and remand this case with instructions to dismiss.

II.

THE TRIAL COURT ERRED IN DENYING MERAMEC'S TWO (2) MOTIONS FOR DIRECTED VERDICT, MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR NEW TRIAL AND ENTERING JUDGMENT AGAINST MERAMEC FOR FRAUDULENT MISREPRESENTATION, BECAUSE UNDER MISSOURI LAW, BIANCO FAILED TO SATISFY THE ELEMENTS OF FRAUDULENT MISREPRESENTATION BY SUBSTANTIAL EVIDENCE AND FAILED TO MAKE A SUBMISSIBLE CASE FOR THE JURY, IN THAT, ITS WITNESSES' TESTIMONY AND DOCUMENTS OFFERED AT TRIAL FAILED TO DEMONSTRATE THAT MERAMEC'S ALLEGED REPRESENTATIONS WERE STATEMENTS OF FACT OR WERE ANYTHING MORE THAN A PROMISE, THAT THEY WERE FALSE OR THAT MERAMEC KNEW OF THEIR FALSITY, THAT MERAMEC INTENDED THAT THEY SHOULD BE ACTED UPON BY BIANCO IN THE MANNER REASONABLY CONTEMPLATED, THAT MERAMEC INTENDED THAT BIANCO RELY OR THAT BIANCO HAD A RIGHT TO RELY ON THEM, THAT THEY WERE MATERIAL OR THAT BIANCO SUFFERED ANY QUANTIFIABLE DAMAGES AS A RESULT THEREOF. THE TRIAL COURT'S ACTIONS CONSTITUTED REVERSIBLE ERROR,

AND THE JUDGMENT SHOULD BE REVERSED AND REMANDED FOR A NEW TRIAL OR REMITTUR.

A. Standard of Review

Although a jury verdict will not be overturned on appeal unless the probative facts fail to support it, the Trial Court erred in failing to grant Meramec's Motions for Directed Verdict and Motion for Judgment Notwithstanding the Verdict, in that, even after reviewing the evidence in the light most favorable to the verdict, essential elements in Bianco's fraudulent claim were not supported by substantial evidence. *Botanicals on the Park,* 7 S.W.3d at 467-468; *Stewart,* 929 S.W.2d at 322.

B. Bianco's Failure to Satisfy Each Element of Its Fraudulent Representation Claim Requires This Court to Reverse and Remand the Judgment.

Fraudulent misrepresentation is among the more difficult claims to prove in Missouri. Missouri courts have demonstrated their disfavor of this cause of action from beginning to end by first requiring plaintiffs to set forth such claims with particularity, and then requiring proof of nine distinct elements through substantial evidence. *State ex rel. Painewebber, Inc. v. Voorhees,* 891 S.W.2d 126, 128 (Mo. 1995); *Botanticals,* 7 S.W.3d at 468; Mo.R.Civ.P. 55.15. Specifically, a plaintiff must set forth facts that prove: 1) a representation; 2) its falsity; 3) its materiality; 4) the

speaker's knowledge of its falsity or ignorance of the truth; 5) the speaker's intent that it should be acted upon; 6) the hearer's ignorance of its falsity; 7) the hearer's reliance on its truth; 8) his or her right to rely thereon; and 9) the hearer's consequent and proximate injury. *Botanicals*, 7 S.W.3d at 468*; Cabinet Distributors, Inc. v. Redmond*, 965 S.W.2d 309, 312 (Mo. App. E.D. 1998).

"Substantial evidence is evidence which, if true, has probative force upon the issues and from which the trier of fact can reasonably decide a case." *Botanicals*, 7 S.W.3d at 468. Although a court may allow circumstantial evidence, because a plaintiff can seldom prove fraud through direct proof, it remains a question of law whether the evidence presented was substantial and inferences drawn therefrom were reasonable. *Id.* A plaintiff fails to make a submissible case "if it solely depends on evidence which equally supports two inconsistent and contradictory factual inferences because liability is then left in the realm of speculation, conjecture and surmise." *Blanke v. Hendrickson*, 944 S.W.2d 943, 944 (Mo.App. E.D. 1997). Furthermore, a plaintiff cannot submit a fraud claim where the facts and circumstances presented to the jury are consistent with honesty and good faith or fraud. *Id.* The veracity of a representation is determined as of the time it was made and as of the time it was intended to be relied and acted upon. *Id.; Botanicals*, 7 S.W.2d at 468. The "failure to establish any one single element is fatal to recovery." *Richmeyer v. Sugar Creek Builders, Inc.*, 856 S.W.2d 382, 384 (Mo.App. E.D. 1993), quoting *Empire Gas Corp.*

v. Small's LP Gas Co., 637 S.W.2d 239, 243 (Mo.App. 1982). These are tough standards by any measure, and despite culling through the reams of exhibits and testimony, Bianco failed to make a submissible case of fraudulent representation. Therefore, because the Trial Court erred by failing to grant Meramec's Motions for Directed Verdict and Motion for Judgment Notwithstanding the Verdict, the judgment in this cause should be reversed and remanded.

C. Even As Alleged, the Fraudulent Misrepresentations Were, At Most, Expressions of Opinion or Promises Bianco Claimed Were Not Fulfilled.

In its instructions to the jury[37], Bianco alleged that Meramec made five misrepresentations to induce Bianco to provide Meramec additional collateral, summarily, that Meramec would (a) not demand further additional collateral; (b) allow the parties to meet with the manufacturers and the proposed buyer to complete the sale of the business; (c) stop the replevin and taking of [Bianco Kawasaki's] inventory if the meetings on October 7 and 8, 1997 occurred and the negotiations for the sale of the business "proceeded in good faith"; (d) attend the meetings and make a "substantial effort" to resolve the sale of the business; and (e) not recommence the

[37]Jury Instruction No. 7 is set out in full in Point III. Mo.R.Civ.P. 84.04(e).

replevin and taking of the inventory "without advising [Joel Bianco] that a resolution cannot be achieved" and [Meramec] was going to continue the replevin and taking. (LF 90). As explained herein, Missouri courts have held that none of these can be characterized as fraudulent misrepresentations actionable at law.

1. The Alleged Opinions and Predictions Are Not Fraudulent Misrepresentations.

Courts have repeatedly held that, "(e)xpressions of opinion are insufficient to authorize a recovery for fraudulent misrepresentation because they are deemed not to be material to a transaction. Mere statements of opinion, expectations and predictions for the future are insufficient to authorize a recovery for fraudulent misrepresentation." *Watkins v. Gross*, 772 S.W.2d 22, 24 (Mo.App. E.D. 1989)(statement that plaintiff "should have no trouble" obtaining liquor license held an opinion, expectation and prediction for the future), citing *Clark v. Olson,* 726 S.W.2d 718 (Mo. 1987); *Richmeyer,* 856 S.W.2d at 384 ("Don't worry about your money" was, at most, an opinion).

Bianco alleged that Meramec fraudulently misrepresented that it would "not demand additional collateral," "allow the parties to meet," "attend the meetings," "stop the replevin," and "not recommence the replevin" for a period of time. (LF 90). However, these are merely restatements of alleged promises contained in the Standstill

Agreement. (Tr.Ex. 36). They all speak of future conduct and do not relate to a past or existing fact. *Titan Construction v. Mark Twain Bank,* 887 S.W.2d 454, 459 (Mo.App. W.D. 1994); *Thoroughbred Ford, Inc. v. Ford Motor Company,* 908 S.W.2d 719, 732 (Mo.App. E.D. 1995)(purchasing dealership upon manufacturer's promise to relocate was, at most, unkept promise).

Bianco further failed to prove that Meramec, at any time, fraudulently misrepresented to Bianco that it would make a "substantial effort" to resolve the sale of the business as stated in subparagraph (d) of Instruction Number 7. In addition to the fact that this alleged misrepresentation was never pled with particularity, the evidence produced at trial demonstrated that this statement was communicated in a letter dated October 6, 1997 from Meramec's counsel and sent (via facsimile) to counsel for Kawasaki with a copy to Bianco's attorney and Meramec. (Plaintiff's Tr.Ex. 35). In relevant part, the letter indicated that Meramec and Bianco had entered into the Standstill Agreement, with a copy attached, and that, as of that moment, Meramec believed that it had secured

> . . . oral commitments from all manufacturers, other than Kawasaki, to attempt to resolve this matter in order to facilitate the transfer of the dealership in question to Fisher/Mauer.
>
> [Meramec] is prepared to make a substantial effort with all parties concerned to resolve this matter.

(Tr.Ex. 35).

What Meramec intended to convey by the term "substantial effort" was never discovered at trial. It remains a highly subjective, if not downright ambiguous phrase. No reasonable person could describe it as a misstatement of fact. See *Chase Resorts, Inc. v. Johns-Manville Corp.,* 476 F.Supp. 633, 639 (E.D.Mo. 1979), *aff'd* 620 F.2d 203 (8th Cir. 1980) ("years of trouble free service" was "so vague and abstract that a court would have "to guess as to the precise nature of the material fact allegedly misrepresented"). The preceding sentences of the Standstill Agreement had plainly stated that it already had written or oral commitments with all of the other relevant parties. (Tr.Ex. 35). On its face, Meramec, at most, was attempting to convey its opinion to the only manufacturer yet to come to the table that Meramec was "prepared to" do something in the future "with all parties concerned to resolve this matter." (Tr.Ex. 35). Each of the alleged misrepresentations appears to be a classic case of a statement of opinion, expectation or prediction for the future that, as a matter of law, cannot form the basis for fraudulent misrepresentation. *Watkins,* 772 S.W.2d at 24; *Richmeyer,* 856 S.W.2d at 384.

2. Unfilled Promises Are Not Fraudulent Misrepresentations.

Additionally, a fraudulent misrepresentation must be distinguished from a promise, which unless it is accompanied by a "present intent not to perform" is not

actionable. *Stewart,* 929 S.W.2d at 323, citing *Carlund Corp. v. Crown Center Redevelopment Corp.*, 910 S.W.2d 273, 279 (Mo.App. W.D. 1995). "Failure to perform alone, however, is not sufficient to establish the intent of the promisor at the time the agreement was made. The mere giving of a promise, though breached the next day, does not give rise to an action for tortious fraud." *Id.* In other words, because fraud is never presumed and any doubts should err on the side of good faith, a plaintiff must not only prove breach of promise but that the defendant intended to breach it when the promise was made. *Stewart,* 929 S.W.2d at 323.

For example, the plaintiff in *Stewart* co-owned stock in a real estate investment company which purchased a parcel of lakefront property by assuming a $285,000.00 promissory note and deed of trust held by June and Wallace Brunson (the "lakefront note"). *Id*. After the sale, the plaintiff sold his interest in the company to the other co-owner and his wife in exchange for a separate promissory note secured by a deed of trust on the property (the "buyout note"). *Id.* Of course, the company defaulted on the lakefront note and the Brunsons initiated foreclosure of the property. *Id.*

To forestall foreclosure, the remaining owner told the plaintiff that if he agreed to release his (second) deed of trust on the property and instead take a lien against the company stock, then the "white knight" defendant would provide the financing necessary to satisfy the lakefront note and take a first deed of trust on the property. *Id*. The plaintiff signed the release. *Id.* After discovering other lien claimants to the

property (which would prime the defendant under this scenario), the defendant instead assumed the lakefront note directly from the Brunsons. *Id.* As could be expected from such events, the company failed to make payments to the defendant who then foreclosed. *Id.*

Suing the defendant for fraudulent misrepresentation, the plaintiff claimed the defendant induced him to release his second deed of trust because of the defendant's promise to loan the company money. *Id.* On appeal, the court reversed and remanded the jury's verdict in favor of the plaintiff finding, "[T]here was not evidence that [the defendant] did not intend to carry out his promise to loan the money to the [company] when he made it." *Id.* (emphasis added). The evidence presented only seemed to show that the defendant changed his mind after the representations were made – when he discovered the additional liens. *Id.* Thus, the court found that the defendant, at most, failed to perform but did not defraud. *Id.* at 324.

Legally, this may appear to be a distinction with very little difference, but it is instead a shrewd attempt by Missouri courts to step from behind the bench and examine the reality of most arms-length transactions. If the courts turned every broken promise into fraud, then we could no longer trust that contracts represent a meeting of the minds and no longer reason that sometimes it makes economic sense to breach (which is why contract damages are compensatory and not punitive). Instead, what Missouri courts are saying is that bad deals and broken promises are not

actionable as fraud, and they are not going to intervene unless plaintiff can show that defendant planned it from the start and there was no other justification for his actions.

Fraudulent misrepresentation is even more difficult to establish where a written agreement (forming the basis of the alleged misrepresentations) exists between the parties. "The mere failure to perform a contract cannot serve as the basis of tort liability." *Titan Construction,* 887 S.W.2d at 459, quoting *State ex rel. William Ranni Associates, Inc. v. Hartenbach,* 742 S.W.2d 134, 140 (Mo. 1987). To illustrate, in *Titan Construction,* the court affirmed a summary judgment in favor of the defendant-bank on plaintiff's claim of fraudulent misrepresentation arising from the bank's alleged breach of contract.[38] *Titan*, 887 S.W.2d at 459. To distinguish between the two claims, the court ascertained "the source of the duty claimed to have been violated, and when the duty alleged to have been breached stems from a contract, the breach does not amount to a tort." *Id.*, citing *William Ranni, supra.* The plaintiff alleged that the bank "broke its promises" and misrepresented that it would abide by their written agreement, which stated that the bank would negotiate in good faith and pay plaintiff monthly. *Id.* at 459. However, these very provisions were contained in the written contract. *Id.* Thus, what plaintiff complained of was not a

[38]A jury also subsequently found in the bank's favor on plaintiff's breach of contract claim. *Titan,* 887 S.W.2d at 457.

misrepresentation of fact but a breach of promise. *Id*.

The pleadings[39] and evidence in the instant case demonstrated that Bianco was complaining of Meramec's alleged failure to comply with the terms of the Standstill Agreement, [40] not any alleged misrepresentations contained therein. The source of any

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[39]Bianco pled from the outset that:

"[Meramec] represented to [Bianco] that in exchange for [Bianco's] posting of additional security, which [Bianco was] not obligated to do, [Meramec] would negotiate in good faith and work with the suppliers, Bombardier, Kawasaki and Polaris, to arrive at an arrangement which would keep [Bianco Kawasaki] in business until a sale was consummated; was and would continue to only make demand of [Bianco] for amounts which were actually due and owing; would not interfere with the sale of the business of [Bianco Kawasaki]; and had called off all efforts to seize the property of [Bianco Kawasaki] and would not reinstate those efforts without first notifying [Bianco]."

(LF 15, ¶ 52).

[40]The Standstill Agreement, in part, states the following:

"In exchange for providing this additional security to [Meramec], [Meramec] has agreed to temporarily suspend its replevin action in the matter of [the Replevin Case]

Provided:

(1) a meeting takes place on October 7, 1997, at 3:00 p.m. at the law office of Paule, Camazine & Blumenthal P.C., among Bianco and their attorney, [Meramec] and its attorneys, and Nevan Fisher/Thomas Mauer and their attorneys; and

(2) a meeting take place on October 7, 1997, at 5:00 p.m. or October 8, 1997, at 9:00 a.m. at the law office of Paule, Camazine & Blumenthal, P.C. among representatives of all manufacturers who have supplied equipment to Bianco and representatives of Bianco, Fisher/Maurer, and [Meramec].

In the event that a resolution among all the parties to be present on October 7, 1997, does not take place, and a resolution among all the parties who are to be present on October 8, 1997, does not take place, then and in that event, [Meramec] has the option to continue its replevin action of the remaining assets of Bianco.

Bianco further agrees that [Meramec] has permission to place a security guard within the premises [of Bianco Kawasaki] at all times after the execution of this Agreement until a resolution among the parties is achieved, or until [Meramec] advises Bianco that resolution cannot be achieved and [Meramec's] replevin action continues." (Bianco's Tr.Ex. 36).

duty owed by Meramec arose directly from the promises contained in the Standstill Agreement. See *Titan Const.*, 867 S.W.2d at 459. That duty, if breached, stemmed from the Standstill Agreement, not any independent misrepresentations therefrom. *Id*. As such, Missouri law has held that -- on their face – these claims are not actionable in fraud.

D. Meramec's Alleged Misrepresentations Were not Material to Bianco's Agreement to Provide Additional Collateral Because Bianco Was Already Obligated to do so.

There is an additional problem -- materiality -- when a party bases a fraud claim on provisions arising from a written agreement, because the damage allegedly suffered is actually the consideration for the contract. In the instant case, Bianco alleged that Meramec made fraudulent misrepresentations regarding the Replevin Case to induce Bianco to provide additional collateral. (LF 90). Two conclusions can be drawn from this, either of which defeat Bianco's claim. First, if Bianco was obligated to provide additional collateral pursuant to its existing loan agreements, then whatever Meramec represented, it could not fraudulently induce Bianco to do something it was already obligated to do. *Hueseman v. Medicine Shoppe International, Inc.*, 844 S.W.2d 128, 130 (Mo.App. E.D. 1993).

The plaintiff in *Hueseman*, co-owner of a pharmacy, alleged that the defendant,

a franchisor, made fraudulent misrepresentations that caused the plaintiff to execute documents related to the termination of the franchise. *Id.* at 129. The Eastern District held that such representations were not actionable because the plaintiff was already under a pre-existing obligation to execute such documents. *Id.* "Consideration consists of either a detriment to the promisee or benefit to the promisor. *(Citations omitted).* A promise to carry out an already existing contractual duty does not constitute consideration. Nor does the preexisting duty constitute consideration." *Id.* at 130. Because the defendant had a right to require the plaintiff to execute the documents pursuant to their preexisting agreements, then "[n]o statements allegedly made to induce that performance were material to the act of executing those documents . . . and no cause of action for fraud arose from it." *Id.* at 130.

Bianco executed numerous loan documents – promissory notes, security agreements, and guaranties – in favor of Meramec. These commonly used documents provided Meramec with broad powers over Bianco and Bianco's property in order to protect its existing collateral and its source of repayment. Among them, Bianco Kawasaki executed a security agreement in connection with the Business Loan. (Tr.Vol.III pp.477-485; Tr.Ex. 89). Bianco knew that under the section entitled "Remedies," the security agreement provided, in part, **"You may demand more security or new parties obligated to pay any debt I owe you as a condition of giving up any other remedy."** (Tr.Vol.III p.484,ln7-14;Tr.Ex. 89). At the time it

filed the Replevin Case, Meramec was undersecured – not unsecured but undersecured -- meaning that if there was a forced liquidation of Meramec's existing collateral, Bianco would still owe money to the Bank. Because Bianco was in default under the Business Loan, Meramec had the right to exercise any and all remedies pursuant to the Business Loan security agreement. This included the right to demand additional collateral to bolster Meramec's position. Because Bianco was obligated under the loan documents, Bianco provided no consideration when it entered into the Standstill Agreement and, like *Hueseman*, any alleged misrepresentations made in or in connection with the Standstill Agreement were **not material** to Bianco's obligation to provide additional collateral to Meramec. Therefore, the alleged fraudulent misrepresentations are not actionable and should not have been submitted to the jury.

E. Bianco Provided No Evidence at Trial That the Statements Were False, That Meramec Knew They Were False or Intended Bianco to Act upon Them.

Second, even if there was consideration for this promise, as previously discussed, each of the misrepresentations alleged by Bianco involved some type of future conduct. The truth or falsity of these alleged representations must be determined as of the time it was made and intended to be relied upon. *Thoroughbred Ford,* 908 S.W.2d at 731. "Furthermore, the intention of the promisor not to perform

an enforceable or unenforceable agreement cannot be established solely by proof of nonperformance. . . ." *Id.* at 732, quoting *Kiechle v. Drago,* 694 S.W.2d 292, 294 (Mo.App. 1985). Evidence of the truth of a statement and the speaker's intent may be found at the time the alleged representation was made or by events which unfold thereafter.

In *City of Fenton v. Executive International Inn,* 740 S.W.2d 338, 339 (Mo.App. E.D. 1987), the plaintiff-city alleged that the defendants misrepresented that they would rebuild a certain roadway in compliance with the city's specifications. *Id.* at 339. The court found evidence that the defendants had started the improvements but were forced to stop (due to an injunction) after a dispute arose over their construction methods. *Id.* Although the roadway was, in fact, not built in compliance with the city's specifications, the court held that the mere fact that the defendants began the construction supported "the truth rather that the falsity of defendants' representations *at the time they were made.*" *Id.* at 339 (emphasis in original). Therefore, the statement (although possibly a promise) was not a misrepresentation of existing fact. *Id.*

F. The Alleged Misrepresentations Were Not False At the Time They Were Made.

Assuming *arguendo* that Meramec even made the alleged misrepresentations, Bianco provided no evidence at trial that the statements were false, that Meramec knew they were false at the time they were made or intended Bianco to act upon them. (LF 90). In *Thoroughbred Ford, Inc. v. Ford Motor Company,* the plaintiff-dealership alleged that Ford induced it to purchase a dealership by misrepresenting that Ford had designated it for relocation to a desirable area. *Thoroughbred Ford*, 908 S.W.2d at 731. Ford offered that it decided not to relocate the dealership when it subsequently received complaints from another dealership in that area along with a market report indicating that particular market could not support an additional dealership. *Id.* at 730. Thus, this Court refused to hold that Ford's alleged statement to the plaintiff was false where Ford's subsequent actions and beliefs "reaffirmed" the veracity of the original at the time it was made. *Id.* at 731.

The evidence in the instant case similarly failed to establish that Meramec knew that the alleged misrepresentations were false, false at the time they were made or that Meramec intended Bianco to rely on them. Bianco introduced correspondence between Meramec and counsel for the other manufacturers and buyers drafted contemporaneously with or immediately following execution of the Standstill Agreement. (Tr.Ex. 34, 35, 36). The correspondence tracked the alleged misrepresentations contained in the Standstill Agreement and demonstrated Meramec's express intent to satisfy the provisions therein.

First, Meramec's letter to Gary Feder, counsel for Fisher and Mauer, indicated that although Bianco had agreed to provide Meramec with additional security, the amount was insufficient to secure its position. (Tr.Ex 34). Thus, Meramec was requesting Fisher and Mauer to provide the shortfall, something that they refused to do. (LF 228,ln.9-21; 230,ln.4-8; Tr.Ex. 34). After all, they had no obligations to Meramec; they were concerned with the manufacturers, with whom they would have to deal in the future, not in Bianco's debts to Meramec. (LF 208,ln.1-10; 231,ln.3-19).

Second, the correspondence expressly requested Fisher and Mauer, the manufacturers, Bianco and their counsel to meet with Meramec "to attempt to resolve this matter in order to facilitate the transfer" of Bianco Kawasaki's assets. (Tr.Ex. 34, 35).

Third, Meramec repeatedly spelled out that it had ceased its replevin of Bianco Kawasaki's assets and that the remaining inventory would remain in Bianco Kawasaki's showroom unless the meetings with all of the interested parties failed to produce a resolution. (LF 223,ln.13-25; 225,ln.19-24; 226,ln.3-8; 228,ln.2-9; Tr.Ex. 35). Most importantly, the Trial Court expressly found that Meramec "substantially honored" its commitment in the Standstill Agreement to cease its replevin upon execution of the Standstill Agreement and did not resume "until after the meeting

disintegrated." (Tr.Vol.V 677,ln.17-20 through 681,ln.14-18; 682).[41]

Fourth, despite what is contained in the instructions, everyone concurred at trial that Meramec attended the meetings and reaffirmed its position previously described to Bianco, Fisher and Mauer, the manufacturers and counsel. (LF 228,ln.3-9).

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[41]Bianco provided no competent evidence that Meramec continued seizing Bianco Kawasaki's property before the second meeting disintegrated. The Trial Court, in fact, found that Jim Jones of Meramec testified to the contrary. (Tr. p.681,ln.9-18). The only suggestion that Meramec began earlier came from Nauni Manty and Joel Bianco who testified that during the second meeting, *Mauer said* he telephoned Bianco Kawasaki, and *another person there said* that Meramec had recommenced the replevin. (Tr. pp.165; 456-458). However, upon Meramec's objection, the Trial Court refused to allow this triple hearsay to prove the truth of the matter asserted, i.e., that Meramec had recommenced the replevin. (Tr. pp.165-167; 456-458). Bianco never produced Mauer or the unidentified observer to substantiate this claim, but asked the Trial Court to allow the hearsay solely for the purpose of showing Fisher and Mauer's state of mind at the second meeting. (Tr. pp.165-167). To the contrary, although Meramec did not deny that it had a truck in the parking lot awaiting orders from Meramec to continue the replevin if the meetings failed, it did not give such orders until after Fisher and Mauer walked out of the second meeting.

Finally, Meramec expressly stated that if each one of the meetings failed to produce "a resolution among all the parties," then Meramec "has the option to continue its replevin action of the remaining assets of Bianco." (Tr.Ex. 36). There was no other condition precedent to continuing the replevin. Meramec later confirmed this in its letter to Kawasaki. (Tr.Ex. 35). From that, Bianco alleged that Meramec misrepresented that it would "not recommence the replevin . . . without advising plaintiff Joel Bianco that a resolution cannot be achieved and [Meramec] was going to continue the replevin . . ." (LF 90). The evidence is threadbare of any such representation.[42] More importantly, for purposes of its veracity and Meramec's intent, the evidence did show that Joel Bianco and Meramec were at the second meeting on October 8, 1997 at which both parties witnessed the buyers walk away from the table, thereby torpedoing any prospect for a resolution among the parties, and giving Meramec an immediate right to continue its replevin. Joel Bianco had his notice –

[42]The only reference to "advising Bianco" is contained in the last paragraph -- a single sentence on a separate page -- of the Standstill Agreement that any reasonable person would deduce related to the duration a security guard could be posted at Bianco Kawasaki. (Tr.Ex. 36). The preceding paragraph dealing specifically with the resumption of the replevin says nothing about notice as a condition thereof. (Tr.Ex. 36).

he witnessed it first-hand. The alleged misrepresentations simply were not false.

G. As a Result of Joel Bianco's Actions, Bianco Did Not Rely Or Have the Right To Rely on Meramec's Alleged Misrepresentations.

Bianco failed to present sufficient evidence from which the jury could have concluded that Bianco had a right to rely and actually relied upon Meramec's alleged misrepresentations. Although Joel Bianco was an impressive salesman, the evidence never characterized him as one who dwelled on details, dollars or documents. (Tr.Vol.V pp.582-584). By the time of the Standstill Agreement, Joel Bianco had completely turned over the books, keys, bank accounts, management -- everything except title to the assets -- of Bianco Kawasaki to Fisher and Mauer. (Tr. pp.77-78; Tr.Ex. 10). The evidence at trial showed that this transfer of control was done hastily and without the advice of counsel while Joel Bianco was relocating to Southern California and working in the entertainment industry (Tr.Vol.III p.430-432; 508ln.19-20). The evidence further demonstrated that Joel Bianco was eager to get the Bianco Kawasaki assets sold to Fisher and Mauer, who he knew could walk away at any time. (Tr.Vol.III pp.533,ln.11-24; 561,ln.15-23; 562,ln.1-3). Joel Bianco wanted the deal with Fisher and Mauer -- the only deal that would provide Joel Bianco with a potential consulting agreement even at the expense of Bianco's creditors, namely, Meramec.

(Tr.Vol.III p.497,ln.9-13).[43]

[43]There was at least one other potential purchaser, Binns, who had actually provided Bianco with a sale contract only weeks earlier. (Tr.Vol.III pp.489-490; 495-497). The purchase price was significantly higher than any offer made by Fisher and Mauer, but Joel Bianco refused Binns' offer primarily because it did not provide a consulting arrangement. (Tr.Vol.III pp.497,ln.9-17). The other material provisions of the two sale contracts were the same. In fact, Fisher and Mauer merely redlined the Binns sale contract and used it as its own. (Tr.Vol.III pp.518-521).

The Fisher and Mauer scheme offered less, because it assumed as part of its calculation that Kawasaki and Polaris would call their respective letters of credit. Joel Bianco claimed he was unaware of this and repeatedly informed Meramec that the letters of credit would not be called. (Tr.Vol.III pp.514-515). However, to continue the business, Fisher and Mauer needed to keep the manufacturers happy (so they would continue their dealership agreement and provide inventory). (LF 230-231). Kawasaki and Polaris, in particular, were owed at least $140,000.00 (the sum of the two letters of credit). By calling on those letters of credit, the balance Bianco owed to them would be reduced, thereby reducing the purchase price Fisher and Mauer would have to pay to purchase the assets of Bianco Kawasaki. (Tr.Vol.III pp.523-

But who was going to be paying on the letters of credit? Meramec was. (Tr.Vol.V pp.560-561). Who was going to be paying back Meramec? Well, Bianco was supposed to, but Fisher and Mauer's purchase price would only cover what the manufacturers were owed. It had no reason to cover Meramec whose collateral they believed was either primed by the manufacturers or themselves [Mauer held a superior deed of trust on Joel Bianco's home (Tr.Vol.III. pp.507-508)] or belonged to Joel Bianco or his mother. Following the asset sale, Bianco Kawasaki would be a mere shell with no funds to pay Meramec, and Joel Bianco, who had already asked his mother to cover his debts, would be in California. (Tr.Vol.III pp.526,ln.19 through 528,ln.9).

Under the Fisher and Mauer arrangement, the letters of credit funded part of their purchase price. Fisher and Mauer had always been evasive about the letters of credit, but it later became evident that they planned the call on the letters of credit from the outset. (Tr.Vol.III pp.514-515; 526; 530). Admittedly, it was a terrific idea from their viewpoint. So, although the Binns sale contract would have provided enough money to substantially, if not fully, pay off Bianco's creditors, including

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525). Fisher and Mauer were not as concerned with Bianco's debts to Meramec, because it would not be assuming those debts under their asset purchase agreement.

Meramec, Joel Bianco refused it in favor of Fisher and Mauer's proposal providing less money to pay off Meramec and more money for Joel Bianco personally. (Tr.Vol.III pp.497,ln.9-17).

Although Bianco repeatedly represented to Meramec in September that he had executed a sale contract with Fisher and Mauer for the purchase of Bianco Kawasaki's assets, the evidence at trial proved that such a contract did not even exist prior to October 1, 1997, and that Bianco only signed such a contract minutes before the first October meeting – again without consulting counsel. (LF 199,ln.3-15; Tr.Vol.III p.374,ln.6-14; Tr.Vol.VII pp.802,ln.3-25; 803,ln.1-2). Under these circumstances, no reasonable person could deduce that Bianco relied or had any right to rely upon the alleged misrepresentations made by Meramec.

Bianco then executed the Standstill Agreement which provided that Meramec would temporarily stop the replevin to give Joel Bianco an opportunity to sell the assets of Bianco Kawasaki to Fisher and Mauer. (LF 226,ln.3-8; Tr.Ex. 34-36). Joel Bianco knew that this was his last chance; Bianco was already out-of-trust with Kawasaki and Polaris, and others had already initiated or were about to initiate lawsuits of their own. (LF 202-203). Although not the first to file suit, Meramec was the first to reach the assets.

Despite the fact that his success and future earnings depended upon selling those assets to Fisher and Mauer, Joel Bianco still did not attempt to assume control

over his business, affairs or obligations. Without the aid of counsel, and knowing he lacked the additional collateral Meramec requested, he signed a draft copy of the Standstill Agreement, the instrument he was supposedly relying upon to bail him out of his troubles. (Tr.Ex. 36). These were not the actions of a prudent businessman. These were not even the actions of a desperate one. Joel Bianco was careless and cavalier, and was more interested in quickly securing his "consulting agreement" with Fisher and Mauer and heading back to California than in satisfying the debts of his corporation. Under these circumstances, Bianco did not rely and had no right to rely on any of the alleged misrepresentations by Meramec.

Moreover, the evidence clearly established that at least two of the alleged misrepresentations were not even made to Bianco and certainly not at the time he was allegedly induced to provide additional collateral. (Tr.Ex. 35; LF 90). Meramec requested Fisher and Mauer to provide additional collateral, and Meramec stated to Kawasaki that it was prepared to make a "substantial effort with all parties concerned to resolve this matter." (Tr.Ex. 34,35). Each of these representations was made directly to counsel for Fisher and Mauer and Kawasaki, respectively, after Bianco executed the Standstill Agreement. (Tr.Ex. 34, 35, 36). Even if these letters made it into the hands of Bianco, Bianco cannot claim he was induced to provide additional

collateral pursuant to the Standstill Agreement[44] based on alleged misrepresentations made after he signed it. See *Chase Resorts, Inc. v. Johns-Manville Corp.*, 476 F.Supp. 633, 639 (E.D.Mo. 1979)(plaintiffs did not rely on statement that equipment would provide "years of trouble free service" in deciding to purchase). Under any analysis, these alleged misrepresentations were not statements of any fact made to defraud Bianco, Bianco did not rely on them, and he and had no right to rely on these or any other alleged misrepresentations by Meramec. The Trial Court erred by failing to dismiss this alleged misrepresentation outright, much less allowing them to be submitted to the jury.

H. Bianco Failed to Present Substantial Evidence of Damages or that Meramec's Alleged Misrepresentations Proximately Caused Bianco's Alleged Damages Thereby Justifying Dismissal, New Trial or Remittur.

Finally, even assuming that Meramec made each and every one of the alleged

[44]The very first sentence of the Standstill Agreement from Bianco to Meramec states: "I, Joel Bianco, am herewith providing additional security to Bank regarding any loans and Security Agreements made to the above persons or entities and/or Security Agreements executed in regard thereto." (Plaintiff's Tr.Ex. 36).

fraudulent misrepresentations and that Bianco relied on them when agreeing to provide Meramec with additional collateral, there was no evidence that Bianco suffered any damages or that Meramec's misrepresentations were the proximate cause of those damages. The failure to prove this element was fatal to Bianco's case, and the Trial Court erred by not taking the claim out of the hands of the jury.

The elements of fraud are never presumed. Bianco asserted that it was "induced . . . into providing additional collateral to [Meramec]" based on its allegedly fraudulent misrepresentations. (LF 16, 90). Bianco is staking its damages on the mistaken belief that Meramec's alleged misrepresentations were the proximate cause of the loss of additional collateral.

Joel Bianco stated that he provided Meramec with additional collateral in connection with the Standstill Agreement. This "additional" collateral included a third deed of trust on Joel Bianco's residence (in which Joel Bianco had little equity), a security interest in a power boat in which Meramec already had a security interest (in which Joel Bianco had minimal equity) and a pledged bank account opened with Mrs. Love's $25,000.00 check (in which Joel Bianco had no equity). (Tr.Vol. I p.197,ln.21-25; Tr.Vol.II. pp.256-257; 260,ln.1-17; Tr.Vol.III p.449-451; Tr.Vol.VI p.722,ln.7-18; Tr.Ex.101,117).

Bianco's prayer for damages asked for rescission of the security documents Bianco executed in connection with the Standstill Agreement. (LF 17). However, at

trial, Bianco did not request and the jury did not grant this equitable relief. The Trial Court also refused to allow an instruction for punitive damages. (Tr.Vol.III pp.862,ln.1-7; 873,ln.7-20). Bianco further requested "returning to Plaintiff Love the $25,000.00 she placed with [Meramec] on October 6, 1997" in connection with the Standstill Agreement. (LF 17; 256,ln.2-5). However, Mrs. Love dropped her claims against Meramec at the close of evidence. (Tr.Vol.VI p.687,ln.18-20; Tr.Vol.VII p.867,ln.6-14; p.868,ln.5-13). The only remaining demand was for consequential damages "in an amount to be determined at trial."[45] (LF 17).

In a fraud case, the measure of damages is the benefit of the bargain rule. This allows the aggrieved party the difference between the actual value of the property and what its value would have been if it was as represented. *Heberer v. Shell Oil Co.,* 744 S.W.2d 441, 443 (Mo. 1988). In *Heberer,* the plaintiff claimed he was fraudulently induced to extend his lease for a service station in reliance on a promise that he would be given the right to operate a service station at a different location. *Id.* at 442. The plaintiff sought recovery for the anticipated profits at the new station. *Id.* The Missouri Supreme Court refused his request holding that the benefit of the bargain rule does not apply where the purchaser receives nothing of value. *Id.* at 443.

[45]Bianco did not provide any schedule of damages making it especially difficult to determine what, if any, consequential damages were suffered.

Because the plaintiff did not receive any property of value in return for the agreement to extend the lease, the court denied the benefit of the bargain damages, i.e., the anticipated profits, arising from the alleged misrepresentation. *Id.* at 443-444. Under such circumstances, the court held that the plaintiff's recovery was limited to the amount the plaintiff paid with interest from the date of payment, plus incidental losses and expenses suffered as a result of the misrepresentations. *Id.*

Similarly, Bianco did not receive any property of value in exchange for providing Meramec additional collateral. Instead, he obtained a short reprieve in which meetings could be held between Bianco, Meramec, the manufacturers and Fisher and Mauer in an attempt to negotiate a potential settlement and sale. By providing additional security, Bianco was not hindered in its ability to sell the assets to Fisher and Mauer – **Bianco *did sell* the assets to Fisher and Mauer**. (LF 214-215). After the Bianco Kawasaki inventory was redelivered to the premises, Fisher and Mauer closed their deal with Bianco. (LF 214-215; 239-240). Bianco never claimed damages resulting from any alleged delay in the closing, and Fisher and Mauer's counsel, although acknowledging some hassles, could not identify any quantifiable damages caused by the delay. (LF 245,ln.20-23). In fact, the alleged misrepresentations and eventual closing all occurred during the winter months, Bianco Kawasaki's slowest sales season. (Tr.Vol.III p.425,ln7-12)

Bianco's theory was that by providing the additional collateral and executing

the Standstill Agreement, Meramec somehow assured Bianco that the assets of Bianco Kawasaki would be sold to Fisher and Mauer. Putting aside for a moment that Fisher and Mauer did purchase the assets, Joel Bianco testified more than once that, independent of any representations by Meramec, Fisher and Mauer could walk away from the deal at any time for any reason. (Tr.Vol.III pp.532-533). Meramec did not have a hold on Fisher and Mauer: they were not customers or debtors of Meramec; no future business was contemplated between the two. Fisher and Mauer were not concerned with Bianco's obligations to Meramec; they only wanted to keep the manufacturers satisfied. (LF 208,ln.1-10; 231, ln. 3-17). Furthermore, if Bianco had not agreed to provide additional collateral pursuant to the Standstill Agreement, then Meramec would have continued its replevin.

Finally, if the two meetings had resulted in a "resolution for all of the parties" at that time, there was no evidence to suggest that any of the additional collateral would have been returned to Bianco. To the contrary, even after Meramec deducted the estimated value of the additional collateral from the balance of Bianco's loans, Bianco still owed Meramec between approximately $104,000.00 and $125,000.00 (the higher amount included the costs of replevin Meramec was entitled to pursuant to the loan agreements). (Tr.Vol.II pp.198,ln.15-25; 199,ln.1-9; 299-301).

Bianco is also not entitled to recover the $25,000.00 Mrs. Love paid to Meramec. Bianco averred that Meramec made its alleged misrepresentations in

exchange for, among other things, Mrs. Love's payment of $25,000.00 as additional collateral for Bianco's loans, for which she was already a guarantor.[46] (LF 11; Tr. pp.159,ln.10-12; 256,ln.2-5; 523). Although Mrs. Love eventually dropped her claims against Meramec, she prayed in the petition for the return of these funds as damages for the alleged misrepresentations. (LF 17). Even if this additional collateral was part of any alleged damages proximately caused by the alleged misrepresentations, Bianco did not aver, claim or otherwise lay any foundation entitling Bianco to this money as damages. Moreover, even if this money came from Bianco, Bianco was already obligated to post this additional collateral under the terms of the security agreement. (Tr. Ex. 86;Tr. IV, p. 484,ln. 7-15). Under any circumstance, it does not constitute damages of Bianco.

Based on the foregoing, there was simply no substantial evidence that Meramec's alleged misrepresentations proximately caused any damages to Bianco, much less to justify the jury's award of $675,000.00 to Bianco. Joel Bianco provided to Meramec a fully encumbered third deed of trust on his residence and a security

[46] Consideration for Mrs. Love's payment may be found in the fact that she was already a guarantor and creditor of Bianco under Bombardier's $100,000.00 letter of credit. (LF 9). (Her guaranty was limited to the balance of the certificate of deposit she pledged, and she was not obligated to guaranty the balance of the letter of credit).

interest in a boat as additional collateral to suspend the replevin -- Bianco Kawasaki did not provide anything -- the assets were sold to Fisher and Mauer. This verdict was simply not supported by the evidence.

Additionally, remittur is appropriate if, after reviewing the evidence, the court finds that the jury's verdict is excessive because it exceeds fair and reasonable compensation for the plaintiff's alleged injuries and damages. *Meyer v. McGarvey*, 856 S.W.2d 904, 908 (Mo.App. E.D. 1993). Under such circumstances, the Trial Court should have granted Meramec's Motions for Directed Verdict or Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial or ordered remittur.

III.

THE TRIAL COURT ERRED IN OVERRULING MERAMEC'S OBJECTIONS TO BIANCO'S JURY INSTRUCTIONS, DENYING JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR NEW TRIAL AND ALLOWING JUDGMENT TO BE ENTERED AGAINST MERAMEC ON THE CLAIM OF FRAUDULENT MISREPRESENTATION, BECAUSE BIANCO'S VERDICT DIRECTOR IN INSTRUCTION NO. 7 SUBMITTED TO THE JURY WAS PLAINLY ERRONEOUS UNDER MISSOURI LAW, IN THAT: THE INSTRUCTION ASSUMED A DISPUTED FACT REGARDING THE MATERIALITY OF THE ALLEGED REPRESENTATIONS; THE INSTRUCTION WAS CONFUSING AND MISLEADING WITH REGARD TO THE MULTIPLE ALLEGED MISREPRESENTATIONS; THE INSTRUCTION ASSUMED DISPUTED FACTS AND WAS CONFUSING AND MISLEADING, IN THAT, IT SET FORTH ALLEGED MISREPRESENTATIONS THAT THE UNDISPUTED EVIDENCE PROVED OCCURRED AFTER MERAMEC ALLEGEDLY INDUCED BIANCO TO PROVIDE ADDITIONAL COLLATERAL. THE TRIAL COURT'S ACTIONS CONSTITUTED PLAIN ERROR, AND THE JUDGMENT SHOULD BE REVERSED AND REMANDED FOR A NEW TRIAL.

A. Standard of Review

The appellate court has wide discretion in reviewing a jury instruction for plain error under Rule 84.13(c). *Peaker v. Stokes,* 1999 WL 304343 *4-6 (Mo.App. S.D. 1999), *reh'g and transfer denied*; *Glidewell v. S.C. Management, Inc.*, 923 S.W.2d 940, 953 (Mo.App. 1996). This Court may grant Meramec relief on the grounds of unpreserved instructional error, if the error constituted "[p]lain error affecting substantial rights" resulting in "manifest injustice or miscarriage of justice." *Mosher v. Levering Investments, Inc.,* 806 S.W.2d 675, 677 (Mo. 1991). **Jury Instruction No. 7.**

INSTRUCTION NO. 7

Your verdict must be for plaintiffs if you believe:

First, defendant induced plaintiff into providing additional collateral to defendant based on the representations that defendant would:

(a) not demand further additional collateral; and

(b) allow the parties to meet with the manufacturers and the proposed buyer to complete the sale of the business; and

(c) stop the replevin and taking of plaintiff Joel Bianco Kawasaki Plus, Inc.'s inventory if the meetings on October 7 and 8, 1997 occurred and the negotiations for the sale of the business proceeded in good faith; and

(d) attend the meetings and make a substantial effort to resolve the sale of the business; and

(e) not recommence the replevin and taking of the inventory without advising plaintiff Joel Bianco that a resolution cannot be achieved and the defendant was going to continue the replevin and taking;

intending that plaintiffs rely upon such representations in providing the additional collateral, and

Second, the representations were false, and

Third, defendant knew that the representations were false at the time they were made, and

Fourth, the representations were material to the plaintiffs, and

Fifth, plaintiffs relied on the representations in providing the additional collateral, and

Sixth, as a direct result of such representation the plaintiffs were damaged.

unless you believe plaintiffs are not entitled to recover by reason of Instruction Number ___ .

MAI 23.05 [1996 Revision] submitted by plaintiffs (LF 90).

B. The Trial Court Committed Plain Error Where A Required Element Was Not Fully Set Forth in the Instruction.

Jury instructions are one of the single most important elements of a trial and often the most troublesome. Juries pour over them trying to decide if their recollection of the evidence fits into the elements set forth in a verdict director. However, before the instructions even reach the jury room, practitioners are expected to read them again and again, for even unintentional mistakes and omissions can result in prejudicial error. Missouri courts have tried to aid parties by creating pattern jury instructions for many common claims. These instructions must be used where applicable. Mo.R.Civ.P. 70.02; *Jenkins v. Keller,* 579 S.W.2d 166, 167-168. (Mo.App. S.D. 1979) (failed to give instruction as written was prejudicial), quoting *Brown v. St. Louis Public Service Company,* 421 S.W.2d 255, 257-259 (Mo. 1967).

The committee that promulgated the MAI considered the precise words to use in each instruction, and deviation therefrom can be prejudicial and reversible. *Jenkins,* 579 S.W.2d at 167 (emphasis in original), quoting *Brown,* 421 S.W.2d at 257. In *Jenkins,* the court held that the defendant's omission of three words from an MAI instruction on contributory negligence was prejudicial to the plaintiff. *Id.* at 167. The defendant admitted that in the MAI instruction, "knew or by the use of the highest degree of care could have known," the highlighted text was omitted from the instruction he submitted to the jury. *Id.* at 167. "[W]here there is a deviation from an

applicable MAI instruction which does not need modification under the facts in the particular case, prejudicial error will be presumed unless it is made perfectly clear by the proponent of the instruction that no prejudice could have resulted from such deviation." *Jenkins, Id.* at 167 (emphasis added), explaining *Brown,* 421 S.W.2d at 259.

More substantial errors, those going to the heart of a claim, are even more alarming. In *Dobbins v. Kramer,* the Western District reversed and remanded where the instruction for fraudulent misrepresentation failed to include the element of intent. *Dobbins v. Kramer,* 780 S.W.2d 717, 719 (Mo.App. W.D. 1989). The court held that the omission of the defendant's intent blurred the line between fraudulent and negligent misrepresentation. *Id.* at 719. "It is the theory of MAI that a verdict director shall submit every essential element of a recovery or defense supported by evidence and actually in dispute." *Id.* at 719, quoting *Weltscheff v. Medical Center of Independence, Inc.,* 597 S.W.2d 871, 878 (Mo.App. W.D. 1980). While acknowledging that the instruction complained of was not, in fact, MAI, the court held that underlying their principal purpose, an MAI (or any other) instruction that omits a disputed element is fatally flawed. *Id.* at 719.

The Southern District even slowed to consider whether the inclusion of a disputed fact in an instruction constituted plain error. *Peaker,* 1999 WL at *4-6. In its instruction, the plaintiff in *Peaker* submitted two theories of fault in support of a

single negligence claim, but one of the theories contained a fact unsupported by the evidence at trial. *Id*. The defendant neglected to object at trial but asked the court to reverse based on plain error in the instruction. *Id*. The court held that submission of this instruction constituted prejudicial error, but stopped short of finding it plain error, instead finding that there was sufficient evidence for a jury to return a verdict on the other *disjunctive* theory and, thus, no manifest injustice had occurred. *Id.* The court's reasoning and dicta conversely suggested that the inclusion of a fact unsupported by the evidence may be considered manifest injustice and plain error. *Id*.

In the instant case, Bianco deviated from MAI 23.05 and, in fact, failed to set for the facts necessary for the jury to determine whether the alleged misrepresentations were material. In relevant part, MAI 23.05 requires the plaintiff to set forth the following:

> Fourth, the representation was material to the (*purchase by plaintiff of the motor vehicle)*, and

MAI 23.05 [1996 Revision](emphasis in original). In Instruction No. 7, Bianco set forth the following:

> Fourth, the representations were material to the plaintiffs, and

(LF 90).

Materiality is one of the nine required elements necessary to prevail on a claim for fraudulent misrepresentation. Not only did Bianco fatally deviate from the MAI,

Bianco **completely omitted the required explanation** as to what transaction or decision the misrepresentations were material. Instead, Bianco substituted only the word "plaintiff" for the parenthetical phrase that was required to narrow the subject matter of the materiality. The parenthetical was not optional; Bianco was required to complete the fourth element in the instruction. Failing to submit this issue to the jury was prejudicial and plainly erroneous, in that, Meramec presented documentary evidence proving that Bianco was already obligated pursuant to loan agreements to provide the additional collateral requested from Meramec. See Point Relied On II, *supra.* As a result, the jury was given a roving commission to determine, on its own, the subject matter of the alleged materiality.

Missouri law has held that misrepresentations inducing a party to do something it was already obligated to do are not material and, thus, not actionable as fraud. *Hueseman, supra.* Submitting Instruction No. 7 without a required element necessary to support Bianco's claim of fraud was plainly erroneous and will result in a miscarriage of justice if left uncorrected.

C. The Trial Court Committed Plain Error By the Instruction To the Jury Where the Multiple Misrepresentations Set Forth Therein Were Bound To and Did Confuse The Jury.

Bianco's verdict director was so complex and convoluted that it was virtually impossible for the jury, or anyone else, to determine what Bianco was complaining of. Bianco set forth the alleged misrepresentations in five subparagraphs all separated by the conjunctive "and" within the first element of Instruction No. 7. (LF 90). However, buried in three of these subparagraphs, Bianco set forth even more multiple representations again all separated by the conjunctive "and". Such drafting forced even the jury to question whether "disbelief in one component of the instruction mean[s] that the whole statement is disbelieved?" (LF 103).

For example, if you believe the first part of subparagraph (e) that Meramec misrepresented that it would ("not recommence the replevin"), **and** the second ("and taking of the inventory without advising plaintiff Joel Bianco that a resolution cannot be achieved"), **but not** the third ("and the defendant was going to continue the replevin and taking"), then is the entire statement to be disbelieved? (LF 90). These were multiple misrepresentations all strung together in **one** subparagraph – and there were **five** subparagraphs!

The MAI general exclusions state that although a *"single theory of recovery"* may be supported by several *"elements,"* submitting multiple theories of recovery in the conjunctive in a single instruction is prohibited. *Kansas City v. Keene Corporation,* 855 S.W.2d 360, 369 (Mo. 1993); MAI 1.02 Committee Comment (1996 Revision)(emphasis in original). In *Keene,* the Missouri Supreme Court

explained that submitting multiple misrepresentations in support of a single fraud does not violate the prohibition set forth in MAI 1.02. *Id*. at 369. In that case, the plaintiff alleged the defendant made multiple misrepresentations contained in a single brochure. *Id*. The plaintiff then set forth each of those misrepresentations in the conjunctive in its verdict director in support of a single count of misrepresentation. *Id*. at 368-369. This Court allowed the instruction because each of the multiple representations supported a single theory of fraud. *Id*.

To compare, the court in *Knepper v. Bollinger*, 421 S.W.2d 796 (Mo.App. E.D. 1967), reversed and remanded for a new trial where an instruction contained two separate and distinctive misrepresentations joined by the conjunctive "and". If proven, either misrepresentation would have supported a claim for fraud, but the court held that there was sufficient evidence for only one of the misrepresentations. *Id.* at 799-800. Because of the prohibition in MAI 1.02, the court found that submission of multiple misrepresentations constituted prejudicial error. *Id*. at 800.

Because this is a narrow distinction, the MAI fraud verdict director specifically cautions parties to be wary of combining multiple misrepresentations in the conjunctive. The final comment to MAI 23.05 states the following:

> *Cases involving multiple misrepresentations.*
>
> Submission of multiple representations in a single verdict directing instruction may create a problem in determining whether all

> requisite elements (i.e. falsity, materiality, knowledge, etc.) have been found as to the same representation. A possible approach would be to submit a separate verdict directing instruction as to each alleged misrepresentation, all in a single package with a single damages instruction and a single verdict form.

MAI 23.05 Committee Comment (1996 Revision). This comment, drafted after the decision in *Keene*, not only warns against the practice, but injects an inquiry that should help parties clarify whether their multiple representations are in support of a single theory: Do each of the misrepresentations constitute the same alleged fraud?

In the instant case, the several alleged misrepresentations do not support a single fraud, but instead, multiple frauds. Bianco's verdict director alleges that it was induced to provide additional collateral as a result of (at least) five misrepresentations allegedly made by Meramec. (LF 90). However, several of these alleged misrepresentations occurred after Bianco provided the additional collateral – namely, the alleged "further additional collateral" and "substantial effort" misrepresentations. (Tr.Ex. 34-36). If Bianco was asserting that Meramec defrauded Bianco into providing additional collateral, Bianco can hardly glom on additional representations occurring after the fact in support of the same fraud.

Moreover, these same misrepresentations were also beyond the scope of the pleadings, in that they were never alluded to in the petition. (LF 15 ¶52). *Keene*, 855

S.W.2d at 368-369. Meramec allegedly made these misrepresentations in correspondence, not to Bianco, but to counsel for Kawasaki and Fisher and Mauer. (Tr.Ex. 34-36). These letters were delivered after Bianco executed the Standstill Agreement providing for the additional collateral. (Tr.Ex. 34-36). The petition did not reference these letters to counsel or the alleged misrepresentations contained therein. Therefore, these alleged misrepresentations were beyond the scope of the pleadings and should not have been submitted to the jury in Bianco's verdict director.

At best, Bianco was attempting to join multiple misrepresentations in the conjunctive in support of multiple theories of fraud – in violation of MAI 1.02. At worst, Bianco was including representations beyond the scope of the pleadings which is similarly condemned under Missouri case law.

Still further, the compound nature of Instruction No. 7 is confusing, in that, it appears to a reasonable juror that the Trial Court has already determined that all five (5) of the alleged representations of the defendant had occurred. Instruction No. 7 adds the phrase "based on the representations that defendant would:" followed by the five (5) alleged representations. (LF 90). This follows the phrase "defendant induced plaintiffs into providing additional collateral to defendant." (LF 90). The use of the words "based upon" makes it appear that the Trial Court had already determined that the representations occurred, and that the only thing for the jury to determine is whether the defendant induced plaintiffs into providing additional collateral. (Of

course, it then became easy for the jury to conclude that additional collateral was requested).

This error became even more apparent when the jurors handed out their note in which they stated:

> Does disbelief in one component of an instruction mean that the whole statement is disbelieved? In other words, if we agree with the first statement but disagree with the second, does it make the whole statement false?

(LF 103). It is obvious from this note that the jurors agreed with certain components of the instruction, but disagreed with others. It is entirely likely that some or all of the jurors did not believe that all of these representations had been made, or that all or any of these representations were false. However, the use of the words "based upon" in Instruction No. 7 would lead jurors to believe that the Trial Court had already decided that these representations had been made.

This confusion was only exacerbated by the terse response of the Trial Court "(y)ou will be guided by the instructions as previously submitted to you." (LF 104). This is a fairly common reply by a trial judge to such a juror's question. However, in light of the fact that the error in Instruction No. 7 is its apparent assumption that the Trial Court had already decided disputed facts, this reply only served to erroneously direct the jury to be guided by the Trial Court's determination of those disputed facts.

Under any of these scenarios, Instruction No. 7 was fatally defective causing Meramec prejudice resulting in a manifest injustice, and therefore this instruction was plainly erroneous.

CONCLUSION

Based on the foregoing, Meramec respectfully requests this Honorable Court to AFFIRM the opinion of the Court of Appeals vacating the judgment of the Trial Court for lack of subject matter jurisdiction or, in the alternative, REVERSE and REMAND the cause to the Trial Court for a new trial or with instructions to proceed to a just adjudication on the merits, and for such further relief as the Court deems just and proper.

Respectfully submitted,

CAMPBELL & COYNE, P.C.

By: _____

Michael A. Campbell #35392
Paula Colman #43006
7777 Bonhomme Avenue, 15th Floor
St. Louis, Missouri 63105
(314)721-8000 telephone
(314)721-8080 facsimile

Attorneys for Appellant Meramec Valley Bank

CERTIFICATE OF SERVICE

This is to certify that two copies of the foregoing and one copy of the disk were hand delivered to counsel for Respondents, Thomas Blumenthal, Paule, Camazine & Blumenthal, P.C., 165 N. Meramec Avenue, 6th Floor, St. Louis, Missouri 63105 and counsel for Intervenor, William Daniel, Daniel Law Offices, P.C., 7100 West Main Street, Suite 1, Belleville, Illinois 62223 on the 28th day of January, 2002.

_____

IN THE SUPREME COURT OF MISSOURI
EN BANC

JOEL C. BIANCO, *et al.*,	)	
	)	
Respondents	)	
	)	
v.	)	Supreme Court No. SC 84046
	)	
MERAMEC VALLEY BANK,	)	
	)	
Appellant.	)	

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

COMES NOW Michael A. Campbell, attorney for Appellant Meramec Valley Bank ("Appellant"), and pursuant to Rule 84.06(c) states as follows:

1. Appellant's Substitute Brief includes the information required by Rule 55.03.

2. Appellant's Substitute Brief complies with the limitations contained in Rule 84.06(b) and Special Rule 1.

3. The number of words in Appellant's Substitute Brief excluding the cover, signature block, certificate of service, statutory appendix and this certificate is 29,103.

4. A floppy disk containing Appellant's Substitute Brief is attached hereto. Counsel certifies that said disk has been scanned for viruses and is virus free.

Respectfully submitted,

CAMPBELL & COYNE, P.C.

Michael A. Campbell #35392
Paula Colman #43006
7777 Bonhomme Avenue, 15th Floor
St. Louis, Missouri 63105
(314)721-8000 telephone
(314)721-8080 facsimile
Attorneys for Appellant

IN THE SUPREME COURT OF THE
STATE OF MISSOURI

JOEL C. BIANCO, et al., Respondents, v. MERAMEC VALLEY BANK, Appellant.	No. SC 84046

ON APPEAL FROM THE JUDGMENT OF THE
CIRCUIT COURT OF ST. LOUIS COUNTY
TWENTY-FIRST CIRCUIT
THE HONORABLE JAMES R. HARTENBACH,
AND THE OPINION OF THE
COURT OF APPEALS FOR THE EASTERN DISTRICT

STATUTORY APPENDIX

CAMPBELL & COYNE, P.C.
Michael A. Campbell #35392
Paula Colman #43006
7777 Bonhomme Ave., 15th Floor
St. Louis, Missouri 63105
(314)721-8000 telephone
(314)721-8080 facsimile

Attorneys for Appellant

FEDERAL RULES OF CIVIL PROCEDURE

RULE 13(A) COUNTERCLAIM AND CROSS-CLAIM

(a) Compulsory Counterclaims.

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

MISSOURI RULES OF CIVIL PROCEDURE

RULE 54.21 TIME FOR SERVICE AND RETURN

The officer or other person receiving a summons or other process shall serve the same and make return of service promptly. If the process cannot be served it shall be returned to the court within thirty days after the date of issue with a statement of the reason for the failure to serve the same; provided, however, that the time for service thereof may be extended up to ninety days from the date of issue by order of the court.

RULE 54.22 (a) COURT MAY ALLOW PROCESS, RETURN OR PROOF OF SERVICE TO BE AMENDED, WHEN

(a) The court may in its discretion allow any process, return or proof of service thereof to be filed or amended at any time unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued. The return of service shall be considered prima facie evidence of the facts recited therein.

RULE 55.08 AFFIRMATIVE DEFENSES

In pleading to a preceding pleading, a party shall set forth all applicable affirmative defenses and avoidances, including but not limited to accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, comparative fault, state of the art as provided by statute, seller in the stream of commerce as provided by statute, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, truth in defamation, waiver, and any other matter constituting an avoidance or affirmative defense. A pleading that sets forth an affirmative defense or avoidance shall contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance. When a party has

mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court may treat the pleadings as if there had been a proper designation.

RULE 55.15 PARTICULARITY REQUIRED IN ALL AVERMENTS OF FRAUD OR MISTAKE

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and any other condition of mind of a person may be averred generally.

RULE 55.25 (a) TIME OF PLEADING

(a) Answer When Filed. A defendant shall file an answer within thirty days after the service of the summons and petition, except where service by mail is had, in which event a defendant shall file an answer within thirty days after the acknowledgment of receipt of summons and petition or return registered or certified mail receipt is filed in the case or within forty-five days after the first publication of notice if neither personal service nor service by mail is had.

RULE 55.27 DEFENSES AND OBJECTIONS HOW PRESENTED BY PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE

PLEADINGS

(a) How Presented. Every defense, in law or fact, to a claim in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) lack of jurisdiction over the subject matter,

(2) lack of jurisdiction over the person,

(3) improper venue,

(4) insufficiency of process,

(5) insufficiency of service of process,

(6) failure to state a claim upon which relief can be granted,

(7) failure to join a party under Rule 52.04,

(8) that plaintiff should furnish security for costs,

(9) that plaintiff does not have legal capacity to sue,

(10) that there is another action pending between the same parties for the same cause in this state,

(11) that several claims have been improperly united,

(12) that the counterclaim or cross-claim is one which cannot be properly interposed

in this action.

A motion making any of these defenses shall be made within the time allowed for responding to the opposing party's pleading, or, if no responsive pleading is permitted, within thirty days after the service of the last pleading. Motions and pleadings may be filed simultaneously without waiver of the matters contained in either. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to the claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 74.04, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 74.04.

(b) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for

summary judgment and disposed of as provided in Rule 74.04, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 74.04.

(c) Preliminary Hearings. The defenses specifically enumerated (1)-(12) in subdivision (a) of this Rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (b) of this Rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(d) Motion for More Definite Statement. A party may move for a more definite statement of any matter contained in a pleading that is not averred with sufficient definiteness or particularity to enable the party properly to prepare responsive pleadings or to prepare generally for trial when a responsive pleading is not required. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order, or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(e) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within thirty days after the service of the pleading upon any party or upon the court's own initiative at any time, the court may order stricken from any pleading any

insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(f) Consolidation of Defenses in Motion. A party who makes a motion under this Rule 55.27 may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this Rule 55.27 but omits therefrom any defense or objection then available that this Rule 55.27 permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in Rule 55.27(g)(2) on any of the grounds there stated.

(g) Waiver or Preservation of Certain Defenses. (1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, that plaintiff should furnish security for costs, that plaintiff does not have legal capacity to sue, that there is another action pending between the same parties for the same cause in this state, that several claims have been improperly united or that the counterclaim or cross-claim is one which cannot be properly interposed in this action is waived (A) if omitted from a motion in the circumstances described in subdivision (f) or (B) if it is neither made by motion under this Rule nor included in a responsive pleading. (2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 52.04, and an objection of failure to state a legal defense to a claim may be made in any pleading

permitted or ordered under Rule 55.01, or by motion for judgment on the pleadings, or at the trial on the merits, or on appeal. (3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

RULE 55.32 (a) COUNTERCLAIM AND CROSS-CLAIM

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim that at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if: (1) at the time the action was commenced the claim was the subject of another pending action or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 55.32.

RULE 55.33 AMENDED AND SUPPLEMENTAL PLEADINGS

(a) Amendments. A pleading may be amended once as a matter of course at any time

before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the pleading may be amended at any time within thirty days after it is served. Otherwise, the pleading may be amended only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would cause prejudice in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and within the period provided by law for commencing the action against the party and serving notice of the action, the party to be brought in by amendment: (1) has received such notice of the institution of the action as will not prejudice the party in maintaining the party's defense on the merits and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit service of a supplemental pleading setting forth transactions or occurrences or events that have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

RULE 67.03 INVOLUNTARY DISMISSAL EFFECT THEREOF

A defendant may move for an involuntary dismissal of the civil action for lack of jurisdiction, . . . Defendant may also move for an involuntary dismissal of the civil action for failure of the plaintiff . . . to comply with these Rules 41 through 101 . . .

RULE 70.02 INSTRUCTIONS TO JURIES

(a) Requests for Instructions. Any party may, and a party with the burden of proof on an issue shall, submit written requests for instructions on the law applicable to the issues. Requests shall be submitted prior to an instruction conference or at such time as the court directs. A party need not request a converse instruction until the court has indicated the verdict directing instruction expected to be given. The court may give instructions without requests of counsel. All instructions shall be submitted in writing and shall be given or refused by the court according to the law and the evidence in the case. Each instruction shall be submitted with an original and one copy for the court and one copy for each party. Each copy shall indicate whether it was prepared at the court's direction or by which party it was tendered and shall contain a notation as follows:

"MAI No. ___" or "MAI No. ___ modified" or "Not in MAI" as the case may be.

(b) Form of Instructions. Whenever Missouri Approved Instructions contains an instruction applicable in a particular case that the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other instructions on the same subject. Where an MAI must be modified to fairly submit the issues in a particular case, or where there is no applicable MAI so that an instruction not in MAI must be given, then such modifications or such instructions shall be simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts.

(c) Violation of Rule Effect. The giving of an instruction in violation of the provisions of this Rule 70.02 shall constitute error, its prejudicial effect to be judicially determined, provided that objection has been timely made pursuant to Rule 70.03.

(d) Converse Instruction Effect of Requesting. The request of a converse instruction shall not be deemed to waive any objection to the instruction conversed.

(e) Instructions Conference and Record. The court shall hold an instructions conference with counsel to determine the instructions to be given. The court shall inform counsel as to the instructions that are to be given prior to the time they are delivered to the jury. All instructions refused and all instructions given, including a record of who tendered them, shall be kept as a part of a record in the case. An opportunity shall be given for counsel to make objections on the record, out of the

hearing of the jury, before the jury retires to deliberate.

(f) Instructions How and When Given. After a jury has been sworn to try a case but before opening statements, the court shall read to the jury Missouri Approved Instructions 2.01, which shall be marked and given to the jury along with the other instructions at the close of the case but shall not be reread by the court. With agreement of all parties, the court may give such other preliminary instructions during the trial as will assist the jury in understanding its role or the issues in the case. Agreement is not required for cautionary or withdrawal instructions during the trial. Final instructions in the case, submitting the law applicable to the case, ordinarily should be given prior to final arguments. Instructions that are to be given shall be consecutively numbered and all shall be given as instructions of the court. Except where otherwise provided in Missouri Approved Instructions, they shall be given in such order as the court shall deem advisable. The final instructions on the law governing the case shall be read to the jury by the court and provided to the jury in writing.

RULE 84.04 BRIEFS CONTENTS

(e) Argument. The argument shall substantially follow the order of "Points Relied On." The point relied on shall be restated at the beginning of the section of the argument discussing that point. The argument shall be limited to those errors included

in the "Points Relied On." The argument shall also include a concise statement of the applicable standard of review for each claim of error. If a point relates to the giving, refusal or modification of an instruction, such instruction shall be set forth in full in the argument portion of the brief. Long quotations from cases and long lists of citations should not be included

RULE 84.13 ALLEGATIONS OF ERROR CONSIDERED REVERSIBLE ERROR

(a) Preservation of Error in Civil Cases. Apart from questions of jurisdiction of the trial court over the subject matter and questions as to the sufficiency of pleadings to state a claim upon which relief can be granted or a legal defense to a claim, allegations of error not briefed or not properly briefed shall not be considered in any civil appeal and allegations of error not presented to or expressly decided by the trial court shall not be considered in any civil appeal from a jury tried case.

(b) Materiality of Error. No appellate court shall reverse any judgment unless it finds that error was committed by the trial court against the appellant materially affecting the merits of the action.

(c) Plain Error May Be Considered. Plain errors affecting substantial rights may be considered on appeal, in the discretion of the court, though not raised or preserved,

when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.

(d) Appellate review in cases tried without a jury or with an advisory jury.

(1) The court shall review the case upon both the law and the evidence as in suits of an equitable nature;

(2) The court shall give due regard to the opportunity of the trial court to have judged the credibility of witnesses;

(3) The court shall consider admissible evidence that was rejected by the trial court and preserved. The court may order that proffered evidence that was rejected by the trial court and not preserved be taken by deposition or by reference to a master under Rule 68.03 and returned to the appellate court.

MISSOURI APPROVED INSTRUCTIONS

MAI 1.02 [1965 New] Conjunctive Submissions

The practice of submitting dual or multiple theories of recovery or defense in the conjunctive is prohibited.

MAI 23.05 [1996 Revision] Verdict Directing – Fraudulent Misrepresentations

Your verdict must be for plaintiff if you believe:

First, defendant *(describe act such as "represented to plaintiff that the motor vehicle was new")*, intending that plaintiff rely upon such representation in *(purchasing the motor vehicle)*, and

Second, the representation was false, and

Third, [defendant knew that it was false] [defendant knew that it was false at the time the representation was made] [defendant did not know whether the representation was true or false], and

Fourth, the representation was material to the *(purchase by plaintiff of the motor vehicle)*, and

Fifth, plaintiff relied on the representation in *(making the purchase)*, and [in so relying used that degree of care that would have been reasonable in plaintiff's situation, and]

Sixth, as a direct result of such representation the plaintiff was damaged.

*[unless you believe plaintiff is not entitled to recover by reason of Instruction Number ___ *(here insert number of affirmative defense instruction)*].